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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. ...75-1860

ELIJAH EPHRAIM JHIRAD,

Petitioner,

v.

THOMAS E. FERRANDINA, United States Marshal
Southern District of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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THOMAS E. FERRANDINA, United States Marshal
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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Elijah Ephraim Jhirad respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this international extradition case on April 12, 1976.

Opinions Below

1. District Court Memorandum and Order Denying Jhirad's First Petition for Writ of Habeas Corpus. 355 F. Supp. 1155 (S.D.N.Y. 1973).

2. Magistrate's Opinion and Decision Following § 3184 Extradition Hearing. Not officially reported. Docket No. 72 MCA 1214 April 12, 1973.

3. District Court Opinion and Order Denying Jhirad's Second Petition for Writ of Habeas Corpus.
362 F. Supp. 1057 (S.D.N.Y. 1973).

4. Second Circuit Court of Appeals Opinion and Order Reversing Prior District Court Orders and Remanding Case for Further Findings.
486 F. 2d 442 (2d Cir. 1973).

5. District Court Opinion and Order Denying Jhirad's Application for Order Barring Further Hearing before Magistrate and for Pre-Hearing Discovery.
377 F. Supp. 34 (S.D.N.Y. 1974).

6. Magistrate's Additional Findings on Hearing Following Remand.
Not Officially Reported.
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7. District Court Opinion and Order Denying Jhirad's Third Petition for Writ of Habeas Corpus.
401 F. Supp. 1215 (S.D.N.Y. 1975).

8. Second Circuit Court of Appeals Opinion and Judgment Affirming District Court Orders Following Remand.
—— F. 2d —— (2d Cir. 1976).
Docket No. 75-2102 April 12, 1976.

9. Second Circuit Memorandum and Order Denying Jhirad's Petition for Rehearing.
—— F. 2d —— (2d Cir. 1976).
Docket No. 75-2102 May 21, 1976.

The foregoing opinions, memoranda and findings, being voluminous, are reprinted in a separately bound appendix submitted simultaneously herewith.

Jurisdiction

The judgment of the Second Circuit Court of Appeals was made, entered and filed on April 12, 1976. A timely petition for rehearing was denied on May 21, 1976. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). The jurisdiction of the courts below was invoked under 28 U.S.C. § 2241.

Questions Presented

1. Did the United States Magistrate have subject matter jurisdiction to hear and decide an evidentiary issue respecting the statute of limitations in petitioner's habeas corpus proceeding, despite this Court's decision in *Wingo* v. *Wedding*.

2. Does 18 U.S.C. § 3290 toll the running of the statute of limitations whenever the accused is absent from the jurisdiction; or is proof of flight with the intention to avoid prosecution required. (There is a split in the circuits on this issue.)

3. Did the lower courts' application of the concededly novel doctrine of "constructive flight" to 18 U.S.C. § 3290 —without any prior notice and only after the close of the trial of the limitations issue—deprive petitioner of his constitutional right to due process of law.

4. Did the extradition treaty and the constitutional right to equal protection of the laws require the application of the beyond a reasonable doubt standard of proof to the trial of the limitations issue; or was proof by a mere preponderance of the evidence sufficient.

5. Was there any evidence in the record to sustain the Magistrate's finding that petitioner determined not to re-

turn to India because of fear of prosecution in mid-September 1966.

6. Did the absence of any evidence either that a portion of the Naval Prize Fund was missing or that an eligible recipient had failed to receive his share require the Magistrate to find no probable cause for extradition.

7. Did petitioner demonstrate that the Indian request for his extradition was, in fact, politically motivated and therefore barred by the extradition treaty itself.

Treaty Provisions

India relies upon the British/American Extradition Treaty of 1931 (acceded to by Great Britain on behalf of its then Colony of India in 1942) and upon an exchange of diplomatic notes in 1967 between the United States Department of State and the Indian Embassy in Washington, D.C. confirming the continuing validity of that treaty between the United States and the Republic of India. Its provisions being voluminous, the treaty is reproduced in the separately bound appendix submitted simultaneously herewith.

Statute of Limitations and Tolling Provision

18 U.S.C. § 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3290. Fugitives from justice

No statute of limitations shall extend to any person fleeing from justice.

Extradition Statutes

18 U.S.C. § 3181. Scope and limitation of chapter

The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

18 U.S.C. § 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Habeas Corpus Statutes

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

28 U.S.C. § 2243. Issuance of writ; return; hearing decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. • • •

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Statement of the Case

Petitioner Elijah Ephraim Jhirad—former Judge Advocate General of the Indian Navy—opposes extradition proceedings, instituted by the Government of India, on a charge of misappropriating from a Naval Prize Fund the rupee equivalent of $1,600 in September, 1961.

Jhirad—an Indian Jew by birth—rose to the highest civilian post in the Indian Navy in 1947 following distinguished war time service and admission to the bar at Great Britain's Lincoln's Inn. Following his semi-retirement in 1964—three years after the Prize Fund in question had been completely distributed—Jhirad continued his active international law practice. In July 1966, he left

India with his family to attend a World Jewish Congress in Brussels, to be followed by a business/vacation stay in Europe. At the invitation of the Israeli Government, he and his family emigrated to Israel in 1967, becoming a citizen and Special Adviser to that government on Maritime Affairs. (Jhirad is an internationally recognized scholar on the law of the sea.) In 1971, the Jhirad family emigrated to the United States, where he is a Managing Editor for Warren Gorham & Lamont. Jhirad is presently applying for United States citizenship, having been a permanent resident for five years.

India first filed its charges against Jhirad, in absentia, in 1968. India filed its complaint in extradition in the District Court for the Southern District of New York, in August 1972, pursuant to the British/American Extradition Treaty of 1931 (Appendix A and B). In April 1973, the United States Magistrate, following a hearing pursuant to 18 U.S.C. § 3184, found probable cause to hold Jhirad for extradition on four of the original fifty-two charges (Appendix D)—the remaining counts being barred by the Treaty's application (Article 5, Appendix A, at page 6a) of the American statute of limitations (18 U.S.C. § 3282).*

Jhirad tested both the Magistrate's jurisdiction and the validity of his determination by means of petitions for a writ of habeas corpus, brought before and after the § 3184 hearing, in the District Court pursuant to 28 U.S.C. § 2241. He took a consolidated appeal to the Second Circuit from the denial of both writs (Appendix C and E).

The Court of Appeals (Jhirad I) reversed and remanded to the District Court for further findings on Jhirad's intent in leaving India in July 1966 (Appendix F)—holding (a)

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* Later decisions by the District Court and the Court of Appeals barred two more of the charges on the same ground. Appendix J, at page 92a.

that the statute of limitations had run unless the tolling provision (18 U.S.C. § 3290) applied and (b) that that turned on whether Jhirad had left India for the purpose of avoiding prosecution.* Over Jhirad's objection, the District Court directed the Magistrate to hear and determine this issue (Appendix G).

Following an evidentiary hearing in January 1974, the Magistrate found (Appendix H) that Jhirad left India without intention to flee from prosecution; but the Magistrate then invented a doctrine of so-called "constructive flight", found that Jhirad had decided not to return to India in "mid-September 1966", and concluded that the running of the limitations period had been thereby tolled just days before it would otherwise have expired—on September 25 and 27, 1961—with respect to the last two charges outstanding.

Jhirad's third petition for a writ of habeas corpus to the District Court—again pursuant to 28 U.S.C. § 2241—having been denied (Appendix I), he appealed again to the Second Circuit. In an utterly inexplicable reversal of its earlier construction of § 3290, the panel in Jhirad II held Jhirad's innocent motivation in departing from India was irrelevant and that his mere absence—coupled with his alleged decision not to return for fear of prosecution—was sufficient to trigger the tolling provision. (Appendix J).

Jhirad's application for rehearing—on the ground (a) that the hearing and determination by the Magistrate of an evidentiary issue in the habeas corpus proceeding violated the jurisdictional requirements of 28 U.S.C. § 2243 and (b) that the invention of the doctrine of "constructive flight" only *after* that hearing violated due process require-

* The Jhirad I panel noted that there was a substantial conflict in the circuits on whether § 3290 was triggered by mere absence from the jurisdiction or whether proof of intent to avoid prosecution was required. As a result of the decision in Jhirad II, that conflict still remains.

ments—was similarly denied (Appendix L). This petition followed.

The net result of all of the foregoing is that Jhirad faces extradition to India to stand trial on a charge of misappropriating $1,600 *fifteen years ago.** India nonetheless persists in pursuing this stale and trivial charge. Nor does it deny that it subjected Jhirad, while in India, to enormous harassment because of his outspoken defense of Zionist and Israeli causes at a time when India was a staunch member of the Arab bloc. Jhirad has therefore argued from the outset—and urges again in this Court—that the true motivation of the Government of India in seeking his extradition still is, in fact, political retribution—in plain violation of Article 6 of the Treaty upon which it relies (Appendix A, at page 6a).

REASONS FOR GRANTING THE WRIT

I.

The Magistrate who heard and decided the limitations issue in the habeas corpus proceeding had no subject matter jurisdiction and acted in direct violation of this Court's decision in *Wingo* v. *Wedding*.

Article 5 of the Treaty (Appendix A, page 6a) provides that the American statute of limitations is a bar to extradition. The Magistrate nonetheless held Jhirad for extradition to India; and the latter sought to test the legality of that detention by petition for the writ of habeas corpus. *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925); *Sayne* v. *Shipley*, 418 F. 2d 679, 685-686 (5th Cir. 1969). The Dis-

* India concedes, as it must, that it can only try Jhirad on precisely those charges on which he is extradited in accordance with Article 7 of the Treaty. Appendix A, at page 7a.

trict Court denied Jhirad's petition for the writ. The Court of Appeals reversed and remanded the case for further findings of fact respecting the limitations issues raised by Jhirad in his petition. On the remand, over the objection of Jhirad, the District Court directed the Magistrate to hold the evidentiary hearing called for by the Court of Appeals. (Appendix G, page 70a; 377 F.Supp., at page 37.)

The Magistrate had no subject matter jurisdiction over, and no authority to conduct, an evidentiary hearing in a habeas corpus proceeding under 28 U.S.C. § 2243. *Wingo* v. *Wedding*, 418 U.S. 461 (1974).

In *Wingo*, this Court held that Section 2243 requires evidentiary hearings in habeas corpus proceedings to be held personally before a federal judge, despite the attempt (in that case) of a district court to grant that authority to a United States magistrate pursuant to the court's rule-making power under 28 U.S.C. § 636(b)(3). This court phrased the issue before it in *Wingo* as follows:

> "The question here is whether Federal Magistrates are authorized to conduct evidentiary hearings in federal habeas corpus cases."

The Second Circuit Court of Appeals, below, responded by suggesting (a) that *Wingo* "arose in the wholly different context of a domestic criminal prosecution" and (b) "revolved around an interpretation of an entirely different statute . . . 28 U.S.C. § 636(b)".

Wingo, however, arose in precisely the same context as the case at bar—that is, in a federal habeas corpus proceeding. That the one proceeding was brought to test the legality of the detention of the petitioner following state court criminal proceedings and the other was brought to test the legality of the detention of the petitioner following extradition proceedings is a distinction without a difference. In each case the sole issue was what judicial officer

was authorized by law to conduct an evidentiary hearing within the federal habeas corpus proceeding itself. This Court, in *Wingo*, made no exceptions to its flat and unequivocal command that 28 U.S.C. § 2243 "requires that the District Judge personally hold evidentiary hearings in federal habeas corpus cases. . . ."

Moreover, *Wingo* did not "revolve" around an "interpretation" of § 636(b). This Court simply concluded that that statute—pursuant to which the district court in *Wingo* had sought to proceed—could not and did not override the requirement of § 2243 that the district judge personally hold the evidentiary hearing. In the instant case, the district judge did not even purport to act pursuant to authority in assigning the magistrate the task of holding the evidentiary hearing. The instant case is, therefore, an even more egregious breach of the *Wingo* doctrine than was *Wingo* itself.

The Court of Appeals suggested that "Jhirad would thus impose a bifurcated structure on international extradition proceedings. . . ." It is not Jhirad that imposes the bifurcated structure but rather the Extradition Treaty, which incorporates the domestic statute, together with the clear dictate of this Court in *Wingo*.

The Court of Appeals was incorrect in suggesting that Jhirad had failed to object to the Magistrate holding the evidentiary hearing in the habeas corpus proceeding, and that such objections were non-jurisdictional. Jhirad did object (Appendix H, at page 74a); but more importantly, the objection plainly goes to the subject matter jurisdiction of the Magistrate; and such objections may be raised at any time. Moore's Federal Practice, §§ 0.60[4], 12.23; *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382 (1884); *Louisville & Nashville Ry.* v. *Mottley*, 211 U.S. 149 (1908); *McNutt* v. *G.M.A.C.*, 298 U.S. 178, 189 (1936); *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951); cf. F.R. Civ. P. 12 (h)(3).

II.

There is a conflict in the circuits and within the Second Circuit itself respecting the construction of 18 U.S.C. § 3290 which requires resolution by this Court.

Jhirad is still being held for extradition to India—on the last two of the original 52 charges brought against him—because of the construction and application by the lower courts of the tolling provision (18 U.S.C. § 3290) to the running of the five-year limitations period (incorporated by reference into the Extradition Treaty). There is a substantial conflict respecting the proper construction of that statute not only between the various circuit courts but between the two panels of the Second Circuit which considered Jhirad's appeals (Jhirad I and Jhirad II) from the District Court's denial of his petition for a writ of habeas corpus.

Section 3290 of Title 18 provides that:

> "No statute of limitations shall extend to any person fleeing from justice."

The disagreement between the circuits and between the two panels of the Second Circuit revolves around the meaning of the word "fleeing". The issue is whether mere absence—or staying away—from the jurisdiction is sufficient to activate the tolling provision and, thus, stop the running of the limitations period or whether, on the other hand, the prosecution is required to present sufficient proof that the accused left the jurisdiction with the intent of avoiding prosecution.

In the federal system, the following courts have held that proof of intent to avoid prosecution at the time of the accused's departure from the jurisdiction is required before the tolling provision is triggered. *Streep* v. *U.S.*,

160 U.S. 128 (1895); *Brouse* v. *U.S.*, 68 F. 2d 294 (1st Cir. 1933); *Forthoffer* v. *Swope*, 103 F. 2d 707 (9th Cir. 1939); *Donnell* v. *U.S.*, 229 F. 2d 560 (5th Cir. 1956); cf. *Ferebee* v. *U.S.*, 295 Fed. 850 (4th Cir. 1924).

Similarly, the state courts appear invariably to construe the phrase "fleeing from justice" as requiring proof of intent to avoid prosecution. *State* v. *Washburn*, 48 Mo. 240; *U.S.* v. *Smith*, Conn. 4 Day 121, 27 Fed. Cas. 1158; *Colling* v. *State*, 217 N.W. 87, 116 Neb. 308; *State* v. *Miller*, 87 S.W. 484, 188 Mo. 370; *State* v. *Lem Woon*, 107 P. 974, 57 Or. 482; *Renner* v. *Renner*, 181 A. 191, 13 N.J. Mis. 749; *State* v. *McKenzie*, 174 A. 2d 318; *State* v. *Fowler*, 194 A. 2d 558; *Taylor* v. *State*, 292 N.W. 233, 138 Neb. 156; *State* v. *Estrada*, 114 A. 2d 323, 35 N.J. Super. 459; *State* v. *Williams*, Del. Gen. Sess. 69 A. 2d 299, 6 Terry 61; *Emery* v. *State*, 295 N.W. 417, 138 Neb. 776.

The following cases have been cited by the courts below as holding that § 3290 requires no showing of the accused's intent in leaving the jurisdiction but only proof of his mere physical departure. *Matter of Bruce*, 132 Fed. 390 (Cir. Ct. Md. 1904), aff'd sub nom. *Bruce* v. *Bryan*, 136 Fed. 1022 (4th Cir. 1905); *King* v. *U.S.*, 144 F. 2d 729 (8th Cir. 1944), cert. den. 324 U.S. 854 (1945); *Green* v. *U.S.* 188 F. 2d 48 (D.C. Cir. 1951), cert. den. 341 U.S. 955 (1951).

The Second Circuit panel in Jhirad I, relying upon *Streep, supra*, held squarely that proof of the accused's intention to avoid prosecution in leaving the jurisdiction was required before the tolling provision was triggered. The Jhirad I panel explained that:

> "It does not appear to us to be unreasonable to provide for tolling of the statute of limitations when a person leaves the place of his alleged offense to avoid prosecution or arrest and for not tolling the statute

when a person without such purpose of escaping punishment merely moves openly to another place of residence."

On the remand, the Magistrate expressly found that Jhirad left India in July 1966 "for the primary and immediate purpose of attending a World Jewish Conference in Brussels" and that "he did not leave India for the immediate purpose of avoiding prosecution. . . ." The Magistrate then went on to find that Jhirad had determined not to return to India in mid-September, just days before the five-year limitations period was due to expire on the last two charges presently outstanding against him. The Magistrate concluded that this determination by Jhirad not to return was the equivalent of a "constructive flight" sufficient to trigger the application of the tolling provision.

The findings and the conclusion of the Magistrate were affirmed by both the District Court and by the Court of Appeals.

It is plain that—despite lip service to the decision in Jhirad —the panel in Jhirad II has in fact come down on the side of the line of cases holding that mere absence from the jurisdiction—without proof that the accused left for the purpose of avoiding prosecution—is enough to trigger the application of the tolling provision.

The Jhirad II panel affirmed, but then ignored, the Magistrate's specific finding that Jhirad left India in July, 1966 without intention to flee; the panel said that "the sole issue being contested was Jhirad's intent in absenting himself from India in August and September 1966". But no evidence had ever been submitted by either Jhirad or the Government of India on that issue. Neither the Magistrate, the District Court or the Second Circuit panel in Jhirad II was able to point to any event that occurred, or circumstance that arose, *after* Jhirad left India which

would support a finding that he determined not to return in September 1966 for fear of prosecution. Without exception, every fact or circumstance relied upon by the lower courts occurred or arose prior to Jhirad's departure from India in July 1966; and the Magistrate, as affirmed on appeal, has found those facts and circumstances insufficient to support a finding of flight to avoid prosecution.

Since the District Court and the Court of Appeals left undisturbed the Magistrate's finding that Jhirad's departure was for innocent motives, the facts and circumstances in the record which occurred or arose prior to that departure could not possibly be the basis for a finding that Jhirad decided—a full two months later—not to return to India for fear of prosecution. This is particularly so because Jhirad was under no duty to return; nor had India requested his return. In short, what the Jhirad II panel plainly did was hold that Jhirad's mere leaving the jurisdiction—when coupled with his failure to return—was sufficient to trigger the application of the tolling provision.

Indeed, the whole notion of "constructive flight" applied in Jhirad II is antithetical to the construction of the statute in *Streep, Brouse, Forthoffer, Donnell* and *Jhirad I,* for, under those cases, the inquiry—and the extradition proceeding itself—would have come to a halt the moment the court found Jhirad's departure free of motivation to avoid prosecution. But the panel in Jhirad II looked beyond; and what they found, and relied upon, was an alleged failure to return—which in the context of this case is but the other side of the coin of physical departure—e.g., the mere absence standard.

There is, therefore, a conflict not only between the circuits on the proper construction of 18 U.S.C. § 3290; there is a conflict between the two panels of the Second Circuit which considered the case at bar. The statute in-

volved is one of wide application; and the resolution of the conflict in the interpretation of that statute may only be had by this Court granting certiorari to review the decision below.

III.

The application of the novel doctrine of "Constructive Flight" to the interpretation of 18 U.S.C. § 3290, without prior notice to Jhirad, violated his constitutional guarantee of due process.

Pursuant to its construction of 18 U.S.C. § 3290, the Court of Appeals in Jhirad I remanded the case to the District Court "to make findings on the issue of intent" of Jhirad in leaving India in order to determine whether or not the running of the limitations period—which otherwise had concededly expired—had been tolled.

The essential ingredient of due process in the trial of any issue is adequate notice of the issues to be tried—particularly where personal liberty is at stake. U.S. Constitution, 5th, Sixth and Fourteenth Amendments; *Cole* v. *Arkansas,* 333 U.S. 196 (1948); *Matter of Oliver,* 333 U.S. 257 (1948); *Smith* v. *O'Grady,* 312 U.S. 329 (1941); *Rabe* v. *Washington,* 405 U.S. 313 (1972); *Eaton* v. *Tulsa,* 415 U.S. 697 (1974).

Based upon the opinion in Jhirad I, Jhirad and his counsel went into the Magistrate's hearing on the remand in the belief that the issue on trial was "the intent of the appellant in leaving India". 486 F.2d, at pages 444-445. The District Court—*prior* to the hearing—thought so too. Appendix G, at page 66a, 377 F.Supp., at page 35.

As a result, both Jhirad and India offered evidence directed only to the issue of Jhirad's intent in departing from India in July of 1966. But the Magistrate determined the application of the tolling provision on a completely different fact issue—the timing and motivation of

Jhirad's determination months later not to return to India —an issue which the Magistrate articulated for the first time only after the hearing was over.

Jhirad was denied due process of law by the failure of the court to inform him in advance of the hearing what issues were to be tried. *Cf. Henderson* v. *Morgan,* U.S. Supreme Court, no off. rep., June 17, 1976, No. 74-1529.

The invention of the doctrine of "constructive flight" by the Magistrate only after the close of the hearing on remand was enormously prejudicial to Jhirad, for the Magistrate determined the issue based upon a single piece of testimony he himself elicited from Jhirad while the latter was on the witness stand. In response to the Magistrate's question respecting Jhirad's prior trips abroad, Jhirad responded from recollection—as it later turned out, incorrectly—that he had "normally" gone abroad for about a month at a time "because I couldn't take more than that time off when I was with Naval Headquarters". The Magistrate, although expressly finding that Jhirad left India in July 1966 to attend a World Jewish Conference and without intent to avoid prosecution, went on to conclude that Jhirad decided not to return to India "sometime in the middle of September" 1966 *solely* because Jhirad had by that time been away from India longer than his supposedly "normal" stay. This decision not to return, said the Magistrate, triggered the tolling provision.

This was a wholly irrational conclusion. First, the Magistrate simply ignored Jhirad's testimony that his prior stays abroad had been limited by the fact that he was then on active duty in the Navy while, when he left in July 1966, he was for the first time free of his active Naval duties and under no necessity to return at any given time. Second, Jhirad's recollection on the stand that he normally had stayed away in prior years for about a month was simply incorrect. As he demonstrated in his affidavit to the Second Circuit on his application for reargument, his

passports—one of which is in the custody of the District Court, another in the custody of India, and the third in his own possession—conclusively demonstrate that he had as often as not gone abroad in the past for two or three months at a time. But, ignorant of the issue actually being tried, Jhirad testified from mere recollection and had no opportunity to present the true facts.

In short, the Magistrate's failure to articulate the issue to be tried in advance of the hearing did not merely result in a *non sequitur* in the Magistrate's reasoning; it amounted to a trap. The result was critical to Jhirad's liberty, for the decision to find Jhirad guilty of "constructive flight" in mid-September 1966 permitted the Magistrate—and thereafter the District Court and the Court of Appeals—to hold that the running of the limitations period (on the last two charges upon which India seeks extradition) had beeen tolled just days before the five-year period would have expired on September 25 and September 27, 1966.

Indeed we suggest the very doctrine of "constructive flight" itself is irrational and a violation of Jhirad's constitutional right to due process of law. There is concededly no judicial precedent for the doctrine of "constructive flight". We suggest that the following considerations require a construction of the tolling provision limited to a determination of the accused's intent in leaving the jurisdiction at the time of his actual departure:

(a) This Court declared in *Toussie* v. *United States*, 397 U.S. 112, 114 (1970), that "criminal limitation statutes are 'to be liberally interpreted in favor of repose' [citations omitted]." If that clearcut statement of policy has any meaning at all, it must require that the tolling provision—which is already a sharp infringement on the policy of repose—be narrowly construed in favor of the accused.

(b) The lower courts were unable to enunciate a rational policy argument in support of the creation of this new legal fiction—"constructive flight". This pointless reaching out beyond the plain meaning of the statutory language is thus but one more step in the direction of making the law incomprehensible to the layman and unpredictable even to the lawyer.

(c) The words of the statute itself—"fleeing from justice"—as well as the ordinary dictionary definition of the verb "to flee", clearly refer to the time of departure from the jurisdiction as the only relevant point.

(d) Inherent in the lower courts' focus on Jhirad's decision not to return to India is the incorrect assumption that he was under some obligation to return or, at least that he had been requested to return and had refused. But just the opposite is true. He was under no obligation to return to India at all. Indeed, the record is clear that he left with the express permission of the Indian Navy, the Indian Finance Ministry and the Indian Passport Office—authority from each of whom was required and obtained before he traveled abroad. Far from "fleeing", Jhirad was at all times traveling openly on an Indian passport until 1967 when he emigrated to Israel—well after the five year limitations period had run. Appendix H, at pages 77a-78a.

IV.

The Extradition Treaty and the Constitutional Guarantee of Equal Protection under the Law required the application of the beyond a reasonable doubt standard—rather than mere preponderance of the evidence—to the trial of the limitations issue in the habeas corpus proceeding.

The District Court, in applying the statute of limitations (18 U.S.C. § 3282) and the tolling provision (18 U.S.C.

§ 3290) in accordance with Article 5 of the Extradition Treaty was required to make findings of fact to determine whether or not Jhirad was a "person fleeing from justice"—thus tolling the running of the limitations period. The Magistrate, however, refused to hold India to the same burden of proof on this issue as would be required of the prosecution in a domestic criminal case—thereby depriving Jhirad (a permanent resident alien) of the due process and equal protection of the laws guaranteed him by the United States Constitution.

In holding that Jhirad's decision not to return to India amounted to "fleeing" and that this decision was made in mid-September 1966—just a few days before the limitations period expired—the Magistrate expressly found that India had failed to prove the relevant facts beyond a reasonable doubt. The Magistrate then went on to hold that (1) the applicable standard was proof by a mere preponderance of the evidence and that (2) India had met this burden. Appendix H, at pages 78a-79a, 81a. The District Court and the Court of Appeals concurred.

In so doing, all of the lower courts agreed that the burden of proof could not be mere probable cause—that being the standard only on the hearing of "the evidence of criminality" under 18 U.S.C. § 3184. There, probable cause is arguably an appropriate standard, for the accused will presumably receive a plenary trial on those same issues when he returns to the country requesting extradition. The factual issues raised by the Treaty's application of the American statute of limitations, however, can never be raised in India but only in the courts of this country.

Conceding that the "probable cause" standard was inapplicable to the limitations issue, the lower courts nonetheless refused to hold India to the burden of proof which the prosecution in any domestic criminal case must meet—

that is, proof beyond a reasonable doubt. *People* v. *Kohut*, 30 N.Y. 2d 183 (1972); see also *United States* v. *Belimex Corp.*, 340 F. Supp. 466, 468-469 (S.D.N.Y. 1971); *Buhler* v. *United States*, 33 F. 2d 383 (9th Cir. 1929); *Donnell* v. *United States*, 229 F. 2d 560 (5th Cir. 1956); *Din* v. *United States*, 232 F. 2d 283 (9th Cir. 1956), *cert. den.* 352 U.S. 827; *Brouse* v. *United States*, 68 F. 2d 294 (1st Cir. 1933).

There is no judicial precedent on this issue in the context of an international extradition proceeding; but we suggest that the following constitutional and legal principles require that the evidentiary burden on India be proof beyond a reasonable doubt:

(a) Jhirad—a permanent resident alien since 1971 and a present applicant for United States citizenship—is, of course, entitled to due process and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution to the same extent as U.S. citizens. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

(b) Due process requires the application of the beyond a reasonable doubt standard because the issue being tried in this habeas proceeding—the application of the statute of limitations—directly determines whether or not Jhirad shall have, or shall lose, his liberty. See *In Re Winship*, 397 U.S. 358, 363 (1970); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1968).

(c) Under Article 5 of the Treaty and the constitutional guarantee of equal protection of the law, the domestic criminal statute of limitations, together with its concomitant burden of proof, must be applied to Jhirad in exactly the same manner as it is applied in domestic criminal proceedings, unless there is a rational basis for distinguishing between Jhirad *on this issue* and a domestic

criminal defendant. The very fact which the courts below conceded—that the issue of limitations can and will only be tried in this country—(unlike the "evidence of criminality")—requires the conclusion that there is no difference between Jhirad *on this issue* and domestic criminal defendants.

It is the Treaty itself which imports into the extradition proceedings a domestic criminal statute. It is the Treaty itself which gives the accused the opportunity to rely upon that domestic statute only once in this country, prior to the actual extradition. It is, therefore, the Treaty itself which places Jhirad in exactly the same posture *on this issue* as a domestic criminal defendant.

(d) The courts below, in essence, held that use of the beyond a reasonable doubt standard would be inconvenient for the Government of India, given the problems of time and distance involved. We suggest that due process and equal protection of the laws are principles which do not recognize inconvenience to the prosecution as relevant. Indeed, it is these very problems of time and distance—as measured from the point of view of the individual accused seeking to exercise his one opportunity to raise the limitations defense awarded him by the Treaty—which militate in favor of requiring the Government of India to sustain its burden by proof beyond a reasonable doubt.

(e) The unavoidable effect of the decision of the courts below is to sanction two different constructions of precisely the same criminal statute (18 U.S.C. § 3290) depending upon the status of the individual accused—an abhorrent result which this Court should overturn.

V.

There was no evidence in the record to sustain the Magistrate's finding that Jhirad decided not to return to India out of fear of prosecution.

The lower courts determined that the doctrine of "constructive flight" triggers the application of 18 U.S.C. § 3290 if the accused, having departed the jurisdiction innocently, (a) determines not to return, and does so, (b) out of a fear of prosecution. The Magistrate found that Jhirad had made this decision with this motivation in mid-September 1966, just days before the limitations period would otherwise have expired. There was absolutely no evidence in the record whatsoever of the occurrence of any event or circumstance after the departure of Jhirad from India in July 1966—which the Magistrate expressly found to have been innocent—upon which to base the conclusion not only that Jhirad decided in mid-September not to return, but that he did so out of fear of prosecution. Even assuming, *arguendo*, that the Magistrate could properly infer from the length of Jhirad's stay abroad by mid-September that he had decided not to return—an inference that in truth is but the merest speculation—there was no evidence whatever upon which to base even an inference respecting the motivation for that decision. Since the burden of proof—by whatever standard—was concededly upon the Government of India, the lack of any evidence on this issue requires the conclusion that the tolling provision was not triggered and that the limitations period expired.

VI.

The Magistrate was incorrect as a matter of law in finding probable cause to hold petitioner for extradition.

At the § 3184 hearing, the Government of India was required to make out a *prima facie* case sufficient "to block

out those elements essential to conviction." *Collins* v. *Loisel*, 259 U.S. 309, 317 (1922). The Indian charge sheets, or indictments, charged Jhirad with the equivalent of embezzlement, alleging that a portion of the Naval Prize Fund was missing, that Naval personnel entitled to share in the Fund had not received their portion and that there were withdrawals from the Fund that matched deposits in Jhirad's account. The Magistrate held that India had failed to prove either that any money was missing or that an eligible claimant had not received his share; but he nonetheless found probable cause to hold Jhirad for extradition. That conclusion was incorrect as a matter of law. 29A *Corpus Juris Secundum*, Embezzlement §§ 11(b), 11 (e); 26 Am. Jur. 2d, Embezzlement, § 39; *People* v. *Reynolds*, 214 App. Div. 21, 34-35 (2d Dept. 1925); *People* v. *Cohen*, 352 Ill. 380, 182 N.E. 608 (1933).

Both India and the Magistrate ultimately relied solely on evidence of deposits into Jhirad's bank account which, standing alone, have no evidentiary value whatsoever in an embezzlement case. *Tinsley* v. *Bauer*, 271 P. 2d 110 (Calif. 1954); *Parnell* v. *State*, 339 So. West 2d 49 (Texas Court of Criminal Appeal 1959); *People* v. *Von Cseh*, 9 A.D. 2d 660 (N.Y. App. Div., First Dept. 1959).

In order to try to show a correspondence between the deposits into Jhirad's account and prior withdrawals from the Fund, both India and the Magistrate were forced to rely solely upon evidence respecting the time-barred charges. No such correspondence between withdrawals and deposits exists at all with respect to the two charges upon which the extradition is based. Reliance by the Magistrate solely upon evidence respecting the time-barred charges violated Jhirad's right to due process.

VII.

The uncontradicted evidence established that Jhirad was being sought by the Government of India to punish him for pro-Israel political activity, in violation of Article Six of the Extradition Treaty.

The District Court correctly concluded that Article 6 of the Treaty bars extradition for political offenses and that:

> "A fair reading of the Treaty compels the conclusion that this Treaty creates a prohibition against politically motivated extradition, and therefore the Magistrate properly allowed evidence to be presented on this issue."

The Magistrate found that Jhirad was an "outspoken apostle of the cause of the new nation of Israel" which was "unpopular" since India "is aligned with the Arab bloc of nations."

Nonetheless, the Magistrate found no political motivation in India's actions against Jhirad, even though the uncontradicted evidence showed that Jhirad was under surveillance by the Indian Special Police Establishment because of his public pro-Israel activity, that his telephone was tapped, his mail was opened, and that he had been chastized by the Defense Minister, Krishna Menon, for having negotiated a pro-Israeli International Convention on the law of the sea.

These elements, coupled with (a) the extraordinarily flimsy case brought against Jhirad, (b) the length of time it has taken India to put it together, (c) the amount of money it has obviously expended, and (d) its continued pursuit of Jhirad even after 50 of the 52 charges against him have been time-barred, indicate that India's requisi-

tion for Jhirad's surrender has, in fact, been made with a view to punish him for an offense of political character.

The Government of India produced not a single shred of evidence to contradict this evidence; nor did it in any way attempt to challenge the necessary inferences which must be drawn therefrom, despite the fact that India has known since Jhirad's bail hearing four years ago that such a defense would be raised.

The utterly sham character of the charges against Jhirad is highlighted by the fact that India has apparently not sought to bring either Admiral Katari or P. L. Sharma to trial, despite the fact that they were co-administrators of the Naval Prize Fund in question together with Jhirad. Either one or the other was required to co-sign each of the withdrawal slips or checks which India relies upon as proof of Jhirad's alleged misappropriation. Yet Sharma remains undisturbed at his post in the Indian Naval Law Directorate to this day, while the Admiral appears to be in quiet retirement, undisturbed by the S.P.E.

The charge is embezzlement from a Naval Prize Fund; yet the case was begun not by the Navy but by the Special Police Establishment; the case was presented to the magistrate in India not by the Navy or the Attorney-General but by the Special Police Establishment; the chief witness before the Magistrate in the United States District Court was not from the Navy but from the Special Police Establishment; and it is clearly the Special Police Establishment and not the Indian Navy that wishes to return Jhirad to India.

Moreover, the sheer implausibility of India's case simply boggles the imagination. What India alleges, on the original 52 counts in its charge sheets, is that Jhirad embezzled well over 40 percent of the Fund. And yet—in a country of such grinding poverty that 100 rupees may be a year's income—there is *no* evidence of any complaint being

made by any claimant until nine years after the Proclamation of the Fund was issued, when a sailor wrote to the Navy that he would like a share even though he never filed a claim. The Government of India has been unable to locate a single eligible sailor who did not receive his share of the Fund.

This Court can hardly close its eyes to the fact that, on October 10, 1975, India voted in the United Nations in favor of the resolution equating Zionism with racism—a blatantly anti-Semitic resolution designed, in part, to question Israel's right to existence. Nor should this Court overlook the overwhelming evidence that India, in this past year and a half, has virtually become a dictatorship, with the bulk of its traditional political opposition leadership behind prison walls. Nor should this Court overlook the statement by the Indian Attorney-General to the Indian Supreme Court (as reported in a despatch to the *New York Times*, April 27, 1976):

"There is no personal rights law for the time being."

Under these circumstances, Jhirad, a citizen of Israel to this day (though since 1971 a permanent resident alien of the United States), will have little chance of obtaining a fair trial in India. Indeed, the very fact that the Special Police Establishment is still seeking Jhirad's return for trial on charges limited by the Treaty to $1,600 is perhaps the most practical demonstration that it is not a claimed embezzlement which stands behind India's request for extradition. This Court has no reason to assume that the Government of India, in pursuing Jhirad half way around the world for a decade, has been acting frivolously. Since the two charges for which Jhirad may now be extradited are plainly frivolous—and yet India's pursuit continues—there can no longer be any doubt that political retribution is the real reason behind India's request.

On that ground, the Treaty itself bars extradition; and the writ should issue.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the opinion and judgment of the Court of Appeals for the Second Circuit.

Dated: New York, New York, June 24, 1976.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUN 24 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

~~75~~-1860

No. .....

ELIJAH EPHRAIM JHIRAD,

Petitioner,

v.

THOMAS E. FERRANDINA, United States Marshal
Southern District of New York,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Appendix A, Extradition Treaty of 1931 Between the United States of America and Great Britain.

TREATY SERIES, No. 849

EXTRADITION

TREATY

BETWEEN THE UNITED STATES OF AMERICA

AND GREAT BRITAIN

Signed at London, December 22, 1931.

Ratification advised by the Senate of the United States, February 19, 1932 (legislati[illegible] day of February 17, 1932).

Ratified by the President of the United States, March 3, 1932.

Ratified by Great Britain, July 29, 1932.

Ratifications exchanged at London, August 4, 1932.

Proclaimed by the President of the Unites States, August 9, 1932.

Appendix A, Extradition Treaty of 1931 Between the United States of America and Great Britain.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS an extradition treaty between the United States of America and Great Britain was concluded and signed by their respective Plenipotentiaries at London on December 22, 1931, the original of which treaty is word for word as follows:

THE President of the United States of America,

And His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India;

Desiring to make more adequate provision for the reciprocal extradition of criminals.

Have resolved to conclude a Treaty for that purpose, and to that end have appointed as their plenipotentiaries:

The President of the United States of America:

General Charles G. Dawes, Ambassador Extraordinary and Plenipotentiary of the United States of America at the Court of St. James;

And His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India:

for Great Britain and Northern Ireland:

The Right Honourable Sir John Simon, G.C.S.L., M.P., His Principal Secretary of State for Foreign Affairs;

who, having communicated their full powers, found in good and due form, have agreed as follows:—

ARTICLE 1.

The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions

Appendix A, Extradition Treaty of 1931 Between the United States of America and Great Britain.

stated in the present Treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party.

ARTICLE 2.

For the purposes of the present Treaty the territory of His Britannic Majesty shall be deemed to be Great Britain and Northern Ireland, the Channel Islands and the Isle of Man, and all parts of His Britannic Majesty's dominions overseas other than those enumerated in Article 14, together with the territories enumerated in Article 16 and any territories to which it may be extended under Article 17. It is understood that in respect of all territory of His Britannic Majesty as above defined other than Great Britain and Northern Ireland, the Channel Islands, and the Isle of Man, the present Treaty shall be applied so far as the laws permit.

For the purposes of the present Treaty the territory of the United States shall be deemed to be all territory wherever situated belonging to the United States, including its dependencies and all other territories under its exclusive administration or control.

ARTICLE 3.

Extradition shall be reciprocally granted for the following crimes or offences:—

1. Murder (including assassination, parricide, infanticide, poisoning), or attempt or conspiracy to murder.
2. Manslaughter.

3. Administering drugs or using instruments with intent to procure the miscarriage of women.
4. Rape.
5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a girl under 16 years of age.
6. Indecent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended.
7. Kidnapping or false imprisonment.
8. Child stealing, including abandoning, exposing or unlawfully detaining.
9. Abduction.
10. Procuration: that is to say the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes, or of a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in either case to gratifying the passions of another person provided that such crime or offence is punishable by imprisonment for at least one year or by more severe punishment.
11. Bigamy.
12. Maliciously wounding or inflicting grievous bodily harm.
13. Threats, by letter or otherwise, with intent to extort money or other things of value.
14. Perjury, or subornation of perjury.
15. Arson.
16. Burglary or housebreaking, robbery with violence, larceny or embezzlement.
17. Fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion.

18. Obtaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained.
19.—(*a*) Counterfeiting or altering money, or bringing into circulation counterfeited or altered money.
(*b*) Knowingly and without lawful authority making or having in possession any instrument, tool, or engine adapted and intended for the counterfeiting of coin.
20. Forgery, or uttering what is forged.
21. Crimes or offences against bankruptcy law.
22. Bribery, defined to be the offering, giving or receiving of bribes.
23. Any malicious act done with intent to endanger the safety of any persons travelling or being upon a railway.
24. Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.
25. Malicious injury to property, if such crime or offence be indictable.
26.—(*a*) Piracy by the law of nations.
(*b*) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.
27. Dealing in slaves.

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties.

Appendix A, Extradition Treaty of 1931 Between the United States of America and Great Britain.

ARTICLE 4.

The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded.

If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to for any other crime or offence, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

ARTICLE 5.

The extradition shall not take place if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to.

ARTICLE 6.

A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

Appendix A, Extradition Treaty of 1931 Between the United States of America and Great Britain.

ARTICLE 7.

A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning to the territories of the High Contracting Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed after the extradition.

ARTICLE 8.

The extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and in the territory of His Britannic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

ARTICLE 9.

The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.

Appendix A, Extradition Treaty of 1931 Between the United States of America and Great Britain.

ARTICLE 10.

If the individual claimed by one of the High Contracting Parties in pursuance of the present Treaty should be also claimed by one or several other Powers on account of other crimes or offences committed within their respective jurisdictions, his extradition shall be granted to the Power whose claim is earliest in date, unless such claim is waived.

ARTICLE 11.

If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive or within such further time as the High Contracting Party applied to, or the proper tribunal of such High Contracting Party, shall direct, the fugitive shall be set at liberty.

ARTICLE 12.

All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, and any articles that may serve as a proof of the crime or offence shall be given up when the extradition takes place, in so far as this may be permitted by the law of the High Contracting Party granting the extradition.

ARTICLE 13.

All expenses connected with the extradition shall be borne by the High Contracting Party making the application.

Appendix A, Extradition Treaty of 1931 Between the United States of America and Great Britain.

ARTICLE 14.

His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named—that is to say, the Dominion of Canada, the Commonwealth of Australia (including for this purpose Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland and India. Such accession shall be effected by a notice to that effect given by the appropriate diplomatic representative of His Majesty at Washington which shall specify the authority to which the requisition for the surrender of a fugitive criminal who has taken refuge in the Dominion concerned, or India, as the case may be, shall be addressed. From the date when such notice comes into effect the territory of the Dominion concerned or of India shall be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty.

The requisition for the surrender of a fugitive criminal who has taken refuge in any of the above-mentioned Dominions or India, on behalf of which His Britannic Majesty has acceded, shall be made by the appropriate diplomatic or consular officer of the United States of America.

Either High Contracting Party may terminate this Treaty separately in respect of any of the above-mentioned Dominions or India. Such termination shall be effected by a notice given in accordance with the provisions of Article 18.

Any notice given under the first paragraph of this Article in respect of one of His Britannic Majesty's Dominions may include any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, and which is being administered by the Government of the Dominion concerned; such terri-

tory shall, if so included, be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty. Any notice given under the third paragraph of this Article shall be applicable to such mandated territory.

ARTICLE 15.

The requisition for the surrender of a fugitive criminal who has taken refuge in any territory of His Britannic Majesty other than Great Britain and Northern Ireland, the Channel Islands or the Isle of Man or the Dominions or India mentioned in Article 14, shall be made to the Governor, or chief authority, of such territory by the appropriate consular officer of the United States of America.

Such requisition shall be dealt with by the competent authorities of such territory: provided, nevertheless, that if an order for the committal of the fugitive criminal to prison to await surrender shall be made, the said Governor or chief authority may, instead of issuing a warrant for the surrender of such fugitive, refer the matter to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

ARTICLE 16.

This Treaty shall apply in the same manner as if they were Possessions of His Britannic Majesty to the following British Protectorates, that is to say, the Bechuanaland Protectorate, Gambia Protectorate, Kenya Protectorate, Nigeria Protectorate, Northern Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone Protectorate, Solomon Islands Protectorate, Somaliland Pro-

tectorate, Swaziland, Uganda Protectorate and Zanzibar, and to the following territories in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, that is to say, Cameroons under British mandate, Togoland under British mandate, and the Tanganyika Territory.

ARTICLE 17.

If after the signature of the present Treaty it is considered advisable to extend its provisions to any British Protectorates other than those mentioned in the preceding Article or to any British-protected State, or to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, other than those mandated territories mentioned in Articles 14 and 16, the stipulations of Articles 14 and 15 shall be deemed to apply to such Protectorates or States or mandated territories from the date and in the manner prescribed in the notes to be exchanged for the purpose of effecting such extension.

ARTICLE 18.

The present Treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties. It may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months.

In the absence of an express provision to that effect, a notice given under the first paragraph of this Article shall not affect the operation of the Treaty as between the United States of America and any territory in respect of which notice of accession has been given under Article 14.

The present Treaty shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

On the coming into force of the present treaty the provisions of Article 10 of the treaty of the 9th August, 1842, of the Convention of the 12th July, 1889, of the supplementary Convention of the 13th December, 1900, and of the supplementary Convention of the 12th April, 1905, relative to extradition, shall cease to have effect, save that in the case of each of the Dominions and India, mentioned in Article 14, those provisions shall remain in force until such Dominion or India shall have acceded to the present treaty in accordance with Article 14 or until replaced by other treaty arrangements.

In faith whereof the above named plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done in duplicate at London this twenty-second day of December, 1931.

[SEAL]	CHARLES G. DAWES
[SEAL]	JOHN SIMON

AND WHEREAS, the said treaty has been duly ratified on both parts, and the ratifications of the two Goverments were exchanged at London on the fourth day of August, one thousand nine hundred and thirty-two;

NOW, THEREFORE, be it known that I, Herbert Hoover, President of the United States of America, have caused the said treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the city of Washington this ninth day of August in the year of our Lord one thousand nine hun-
[SEAL] dred and thirty-two, and of the Independence of the United States of America the one hundred and fifty-seventh.

HERBERT HOOVER

By the President:
HENRY L. STIMSON
Secretary of State

Appendix B, Exchange of Diplomatic Notes Between the United States and India Respecting the British/American Extradition Treaty of 1931.

UNITED STATES OF AMERICA

(EMBLEM)

DEPARTMENT OF STATE

(ILLEGIBLE)

(SEAL)

IN TESTIMONY WHEREOF, *I*, JOHN N. IRWIN II, *Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Acting Authentication officer of the said Department, at the city of Washington, in the District of Columbia, this twenty-fifth day of September, 1972.*

JOHN N. IRWIN II
Acting Secretary of State.

By EDWIN H. MCGOWEN
Acting Authentication Officer,
Department of State.

(Illegible)

Appendix B, Exchange of Diplomatic Notes Between the United States and India Respecting the British/American Extradition Treaty of 1931.

(EMBLEM)

The Embassy of India presents its compliments to the Department of State and has the honor to request them to confirm the existence of the Extradition Treaty between India and the United States in these words:—

> "The dominion of India, which came into being on August 15, 1947, became the Republic of India on January 26, 1950 but remains a member of the British Commonwealth of Nations. This change is understood not to have affected any agreements in their application between the United States and India. The Treaty of Extradition between the United States and Great Britain entered into on December 22, 1931 and made applicable to India on March 9, 1942 is therefore considered a good subsisting and binding convention between the United States and India as of this date. A copy of the said Treaty is annexed hereto."

The Embassy of India takes this opportunity to renew to the Department of State the assurances of its highest consideration.

(EMBLEM)

The Department of State acknowledges the receipt of the note No. Con 48(2)/66 dated July 11, 1967 from the Embassy of India and is pleased to confirm as follows the existence of the Extradition Treaty in force between the United States and India.

The dominion of India, which came into being on August 15, 1947, became the Republic of India on January 26, 1950 but remains a member of the British Commonwealth of Nations. This change is understood not to have affected

Appendix B, Exchange of Diplomatic Notes Between the United States and India Respecting the British/American Extradition Treaty of 1931.

any agreements in their application between the United States and India. The Treaty of Extradition between the United States and Great Britain entered into on December 22, 1931 and made applicable to India on March 9, 1942 is therefore considered a good subsisting and binding convention between the United States and India as of this date. A copy of the said Treaty is annexed hereto.

Enclosure:

Treaty Series 849.

(ILLEGIBLE)

Department of State,
Washington, July 21, 1967.

Appendix C, Memorandum and Order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 4026 KTD

ELIJAH EPHRAIM JHIRAD,

Plaintiff,

—against—

THOMAS E. FERRANDINA, United States Marshal,
Southern District of New York,

Defendant.

MEMORANDUM AND ORDER

This case comes to this Court as an application by petitioner, Jhirad, for a writ of habeas corpus, attacking the jurisdiction of a United States magistrate to determine the appropriateness of extradicting Jhirad to India.

The Government of India has sought the extradition, pursuant to 18 U.S.C. § 3182, of Jhirad, who is a native Indian now a resident alien in this country. It is alleged that while Judge Advocate General of the Indian Navy, Jhirad embezzled large sums of money from a naval fund.

Normally, the procedure in an extradition matter, as set forth in 18 U.S.C. § 3184, involves the issuance of a warrant upon complaint and then a hearing before a magistrate, who determines whether there is sufficient evidence to sustain the charged offense under the applicable treaty of extradition. The determination of a magistrate is not directly appealable. *Sayne* v. *Shipley,* 418 F. 2d 679 (5th Cir. 1969), *cert. den.,* 398 U.S. 903 (1970). The only method of attacking such a determination is by a petition for a writ of habeas corpus. Usually, such a writ is sought

after a hearing by the magistrate. Here, however, petitioner has brought this petition before the hearing could take place. In several cases, including *Wright* v. *Henkel,* 190 U.S. 40 (1903) and *Ivancevic* v. *Artukovic,* 211 F. 2d 565 (9th Cir. 1954), *cert. den.* 348 U.S. 818 (1954), petitions have been heard prior to a hearing where there were unusual circumstances.

Petitioner has unfortunately sought to circumvent the normal orderly extradition procedures, and the Court wishes to strongly discourage this premature use of the writ. However, this case has been in limbo for nearly five months after the untimely death of the late Judge McLean, and the Court feels constrained to determine the merits of petitioner's claims.

At the outset, respondent has suggested that a writ of habeas corpus under 28 U.S.C. § 2241 will not lie because petitioner, free on bail, is not "in custody" as the statute requires. Until recently, the "in custody" requirement meant that a prisoner would have to be incarcerated before he could use the writ of habeas corpus. However, the "in custody" requirement has recently been interpreted with greater latitude. In *Jones* v. *Cunningham,* 371 U.S. 236 (1963) the Supreme Court held that a prisoner on parole under the custody and control of a parole board is "in custody" within the meaning of 28 U.S.C. § 2241. Likewise, five years later the Supreme Court in *Carafas* v. *LaVallee,* 391 U.S. 234 (1968), determined that the fact that a petitioner's sentence had expired while his petition for the writ was on review, did not defeat jurisdiction under the Federal statute. Subsequently, the lower courts have expanded the situations in which jurisdiction to grant a writ of habeas corpus will lie. In *Marden* v. *Purdy,* 409 F. 2d 784 (5th Cir. 1969), it was held that a state prisoner free on bond could seek a writ of habeas corpus and in 1970 the same court decided that release on appeal bond was "in

custody" for Federal jurisdictional requirements. *Capler* v. *City of Greenville,* 422 F. 2d 299 (5th Cir. 1970).

Two district courts in this Circuit have echoed the new approach to the "in custody" requirement. Judge Bryan in *Duncombe* v. *New York,* 267 F. Supp. 103 (S.D.N.Y. 1967), by way of dictum, suggested that a person released on bail is legally in custody for the purpose of the habeas statute. In *U.S.* ex rel *Smith* v. *DiBella,* 314 F. Supp. 446 (D.Conn. 1970) the Court held that a petitioner released on his own recognizance was in custody for the purposes of the Federal habeas corpus statute. The underlying reasoning in all of these decisions is that to fall within 28 U.S.C. § 2241, one's liberty of movement must be limited in some substantial way. Though petitioner Jhirad is out on bail, the Court finds that the restrictions on his freedom implicit in his being on bail are such as to come within the import of the statute. Therefore, the Court has power to entertain this application.

The scope of inquiry open to a Federal District Court when deciding a writ of habeas corpus in an extradition case is very narrow, being limited to the following questions:

1) whether the magistrate has jurisdiction;

2) whether the evidence produced at the hearing showed a reasonable ground to believe the accused guilty; and

3) whether the offense alleged is a treaty offense.

Wacker v. *Bisson,* 348 F. 2d 602 (5th Cir. 1965); *Sayne* v. *Shipley,* 418 F. 2d 679 (5th Cir. 1969), *cert. den.* 398 U.S. 903 (1970); U.S. ex rel *Petrushansky* v. *Marasco,* 215 F. Supp. 953 (S.D.N.Y. 1963), aff'd 325 F. 2d 562 (2nd Cir. 1963), cert. den. 376 U.S. 952 (1964), and *Application of D'Amico,* 185 F. Supp. 925 (S.D.N.Y. 1960), appeal denied, 286 F. 2d 320 (1961).

Since there has been no hearing in this case, we are concerned only with the jurisdiction of the magistrate and whether the offense charged is a treaty offense. 18 U.S.C. § 3184, *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933). Of course, the threshold question is whether an extradition treaty exists.

The United States Marshal, Ferrandina, the nominal respondent, and the Government of India, the real respondent to this action, argue that the extradition treaty of December 22, 1931, 47 Stat. 2122, between the United States and Great Britain, serves to support jurisdiction in this case. This Treaty in Article 14 stated that Great Britain could accede to the Treaty on behalf of certain listed territories, among which was India. On March 9, 1942, the Treaty was made effective as to British India. For the following reasons this Court holds that the Treaty of 1932 is valid and of continuing force between the Governments of India and the United States, and will support the jurisdiction of the magistrate to hear the evidence against Jhirad.

Whether an extradition treaty exists is an issue with major foreign policy implications and one which does not easily fall within the sphere of the Judicial Branch of Government. Thus, it is that courts have given great weight to the position taken by the Executive Branch concerning the validity of extradition treaties. In *Sayne* v. *Shipley*, 418 F. 2d 679 (5th Cir. 1909), *cert. den.*, 398 U.S. 903 (1970), the Fifth Circuit said:

> "Because we recognize that the conduct of foreign affairs is a political, not a judicial function such advice [from the Executive Branch] while not conclusive on this Court is entitled to great weight and importance." (418 F. 2d at 684)

In the case at bar, the United States, through the Acting Secretary of State, certified on August 14, 1972, that "the

treaty of extradition between the United States and India is therefore considered a good subsisting and binding convention between the United States and India." Further, the Executive Branch strongly indicated its continuing affirmation of the Treaty when (in July of 1967), in conjunction with a prior extradition between the United States and India, notes were exchanged between the two Governments.

The position of the Executive Branch, though persuasive, is not conclusive. The Court must evaluate the facts concerning the Treaty on its own. Petitioner argues that the Treaty of 1931, under which extradition is sought, though made applicable to British India in 1942, did not survive the creation of the Republic of India in 1950.

As with much of international law, the question of treaty succession is muddled. Yet, it seems generally agreed that some rights and duties do devolve on the new country, particularly those rights and duties locally connected to the area gaining independence. See Oppenheim, *International Law*, Vol. 1 at 157-158.

Particularly in reference to emerging nations, the weight of authority supports the view that new nations inherit the treaty obligations of the former colonies. As one authority has said:

> "There is a tendency in the direction of continuity of treaties upon independence of colonial territories which has been evident for some time respecting multilateral legislative conventions and a fairly wide spectrum of bilateral treaties." (O'Connell, *State Succession in Municipal Law and International Law*, 1967, at 113)

In *Ivancevic* v. *Artukovic*, 211 F. 2d 555, (9th Cir. 1954), *cert. den.*, 348 U.S. 818 (1954), the Ninth Circuit decided that an extradition treaty made between the United States and the Kingdom of Serbia survived the creation of the

Federal People's Republic of Yugoslavia. Though relying in large measure on the view of the Chief Executive, the Court also emphasized that there was sufficient continuity between the first Government and the second, even though there was not geographic identity. Applying this principle of continuity, it is reasonable to find that the Republic of India inherited these treaties. With the exception that Pakistan was separated from British India, there was geographical identity between India in 1946 and 1950. Further, as part of the creation of the Dominion of India, the Indian Government agreed to take an assignment of all treaties signed on its behalf by Great Britain. Therefore, the Treaty of 1931 was in effect in 1946. The subsequent change to a Republic was certainly of only evolutionary nature; thus the Treaty would appear to survive.

Jhirad relies heavily on *State of Madras* v. *Menon,* (1955) 1 S.C.R. 280. The Supreme Court of India in that case held that an act of the British Parliament, (the Fugitive Offenders Act of 1881) which set conditions for extradition among British possessions, was no longer valid after the creation of the Republic in 1950. Reliance on this case is misplaced. The basic feature of the Fugitive Offenders Act was that it made for simplified procedures among British possessions. The Fugitive Offenders Act was an internal statute while the Treaty of 1931 was an external act whereby India as an international person gained rights and obligations vis-a-vis another international person. Further, a recent opinion of the Supreme Court of India in *West Bengal* v. *Kishore,* (1969) 3 S.C.R. 320, raised serious questions as to the continuing appropriateness of relying on the *Menon* decision.

Lastly, the United States Supreme Court has held that the actions of the two countries involved regarding an extradition treaty are of great importance in deciding a treaty's validity. *Terlinden* v. *Ames,* 184 U.S. 270 (1902). Both the Government of India and the Government of the

United States have been unequivocal in relying on the validity of the Treaty of 1931 and in the past there have been extraditions from both countries.

Mindful of the advice of the Executive Department, the actions of both governments and relying on the historical continuity from British India to the Republic of India, this Court holds that the Treaty of 1931 is validly existing between India and the United States.

The second issue raised by the petition for habeas corpus is whether the crime charged is an extraditable offense. Petitioner, Jhirad, has been charged with the crime of Breach of Trust of a Public Servant, § 409 of the Indian Penal Code (IPC). The IPC defines a criminal breach of trust in Section 405 as occurring when

> ". . . whoever, being entrusted with property . . . dishonestly misappropriates or converts to his own use that property in violation of any direction of law . . ."

After stating this general definition in Section 405, the IPC goes on in subsequent sections to enumerate differing penalties based on the status of the entrustee. Section 409 is merely a statement of a specific penalty for the general crime contained in Section 405. Though called "breaches of trust", the crimes defined by Sections 405 and 409 are in essence crimes of embezzlement. They satisfy the classical definition of embezzlement stated by Blackstone in his *Commentaries:*

> "The fraudulent appropriation to his own use or benefit of property or money entrusted to him by another, by a clerk, agent, trustee, public officer or other person acting in a fiduciary character." 4 Blackstone's *Commentaries,* 230, 231.

Article Three of the Treaty of 1931 lists the extraditable offenses and includes larceny and embezzlement in clause

16 and fraudulent conversion in clause 17. The courts have set a standard of liberal interpretation of treaty language. As the Supreme Court said in *Factor* v. *Laubenheimer,* 290 U.S. 276 (1932), "extradition treaties are to be liberally, not strictly, construed." From the general lack of particularity and specificity of the crimes listed in Article Three, it is evident that the intention was to describe the crimes in the most general and inclusive terms. In light of this intention and the standard of interpretation set by the Supreme Court in the *Factor* case, the Court finds the crime charged is included within the ambit of clause 16 of the Treaty.

In *Wright* v. *Henkel,* 190 U.S. 40 (1903), the Supreme Court, while deciding whether an extraditable offense was stated, said:

> "The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties." 190 U.S. at 58.

This apparently was the law until *Factor* v. *Laubenheimer, supra,* 290 U.S. 276. In that case the Court indicated that the question of whether the crime charged must be a crime in the asylum country was a matter of treaty interpretation. The Court went on to indicate that, at most, all that was necessary was that the offense charged was recognized by the jurisprudence of both countries. There is no requirement in Article Three of the Treaty that larceny or embezzlement be crimes in the asylum country. Indeed, the Treaty lists only one offense which must be a crime in both countries to be extraditable, and that is accessorial conduct of any kind. It follows, therefore, that the Treaty does not require that the crime charged be explicitly a crime in the place of asylum.

Even if it were necessary for extradition that there be mutual criminality, it seems quite clear that the acts alleged fall within the ambit of liability of § 155.05 of the New York Penal Law (McKinney 1967) which makes a wrongful taking or withholding of property from its owner a crime. It specifically includes embezzlement, without regard to the status of the person committing such act. It seems clear that the offense charged is within those listed as being extraditable.

Also, in determining whether the offense charged against petitioner, Jhirad, is extraditable, the Court must determine whether the Treaty sets any time limitations on extradition and, if so, whether they have been complied with. *Merino* v. *United States Marshal,* 326 F. 2d 5 (9th Cir. 1963), *cert. den.,* 377 U.S. 997 (1964) Under Article Five of the Treaty of 1931, otherwise permissible extradition cannot take place if the passage of time has caused an exemption from prosecution or punishment "according to the laws of the High Contracting Party applying or applied to." Thus, both United States law, as well as Indian law, must be considered to determine whether the extradition is time barred. See *Hatfield* v. *Guay,* 87 F. 2d 358 (1st Cir. 1937), *cert. den.,* 300 U.S. 678 (1937), (construing the same Treaty).

Given that the Treaty commands reference to the law of the United States, should it be Federal law or State law? It has been suggested that the New York Statute of Limitations should be applied. Cited in support of this contention is *In re Mylonas,* 187 F. Supp. 716 (N.D.Ala. 1960) The *Mylonas* decision stands as a lone example of this approach. If extradition were to be barred by the capricious location among the states of the person sought to be extradited, it strikes this Court that the basic intention of international treaties of extradition, namely uniform, regularized extradition between nations, would be

thwarted. Because of this clear over-riding Federal interest in treaties of extradition, we will look to Federal law regarding the limitations question. *Cf. Garcia-Guillern* v. *U.S.*, 450 F. 2d, 1189 (5th Cir. 1971), cert. den. 405 U.S. 989 (1972)

The Federal Statute of Limitations with regard to non-capital offenses is 18 U.S.C. § 3282. In relevant part, the statute states, "no person shall be prosecuted . . . or punished for any offense, not capital unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." The alleged series of offenses for which petitioner is charged, took place from 1959 through 1961. To be within the five year period under Section 3282, prosecution would have to have been brought by September 26, 1966 at the latest, since the last alleged transaction occurred on the 27th of September 1961. Petitioners and Respondents agree that prosecution in this case was not begun until October of 1968, well after the five year period had expired.

Under 18 U.S.C. 3290 the five year limitations period does not extend to persons "fleeing from justice". Jhirad left India on July 26, 1966, which, if it constituted a "fleeing from justice" would have tolled the statute as to those offenses occurring less than five years before his departure, namely, the alleged transactions on July 27, 1961, September 25, 1961, and September 27, 1961. Petitioner argues that mere absence from the place of the offense will not suffice to prove "fleeing from justice", rather, an intention to avoid arrest or prosecution must be shown.

Turning to the construction of 18 U.S.C. § 3290, the Circuits are divided as to whether to be fleeing from justice, one must intend to escape prosecution. The Fifth Circuit, over a vigorous dissent, held in *B. M. Donnelly* v. *U.S.*, 229 F. 2d 560 (5th Cir. 1956) that intent must be proved and that mere absence was not sufficient to show "fleeing from

justice". However, two other Circuits have held that mere absence from the jurisdiction was sufficient. In *McGowan* v. *U.S.*, 105 F. 2d 791 (D.C. Cir. 1939), *cert. den.*, 308 U.S. 552 (1939), the Court held that in the Statute of Limitations 18 U.S.C. § 538, the predecessor of Section 3290, "fleeing from justice" meant one who is gone from the jurisdiction without regard to intent. Likewise, the Eighth Circuit, in construing Section 538 held that to be fleeing, all that was necessary was to have left the jurisdiction of the crime after its commission. Though not of great weight in determining what the language of Section 3290 means, it is worth noting that all of the cases construing the phrase "fleeing from justice" in the extradition statute 18 U.S.C. § 3182 have held that fleeing is proved by mere absence. See *Appleyard* v. *Massachusetts*, 203 U.S. 222 (1906) and *Roberts* v. *Reilly*, 116 U.S. 80 (1885). This Court finds that petitioner was fleeing from justice by his mere absence from India in 1966. In addition to the case law supporting this view, the Court is persuaded by the fact that the alleged offenses of petitioner are of a type which are likely to go undiscovered for long periods, thus delaying prosecution and making this type of action easily time-barred. If the Court were to decide that fleeing from justice occurred only when there was a finding of an intention to avoid prosecution, the Court would be put in a position of finding the facts surrounding a crime which has occurred in another country. We are reluctant to assume such a role. As to the last three alleged offenses, the Statute of Limitations as set out in 18 U.S.C. § 3290 would not bar extradition.

Article Five of the Treaty mandates that the Court also look to see if the law of India bars this action because of delay. India has no Statute of Limitations, but rather applies a case law principle of unreasonable and unfair delay. Since the Indian rule is a case-by-case approach, depend-

ent upon the facts of each case, it would be very difficult for this Court to suggest that the time period here is so unreasonable as to require barring this action under Indian law. The facts as presented to the Court do not compel a finding of unreasonableness; on the contrary, they indicate careful investigation on the part of the Indian Government, which of necessity took some time.

The Court finds that the magistrate has jurisdiction and that the last three offenses alleged are extraditable. The Court does not decide whether or not all of the alleged offenses might, in fact, constitute one extraditable offense as we find such a determination to be unnecessary. The stay of the magistrate's hearing is hereby vacated. The petition for writ of habeas corpus is denied.

So ordered.

Kevin Thomas Duffy
U. S. D. J.

Dated: New York, N. Y.
January 23, 1973.

Appendix D, Opinion.

UNITED STATES DISTRICT COURT
Southern District of New York

Mag. Dkt. # 72MCA1214

In the Matter of the Extradition of
ELIJAH EPHRAIM JHIRAD
Fugitive from the Justice of the
Government of India

GOETTEL, U.S. Magistrate

A hearing has been held at the request of the Government of India for the Extradition of Mr. Elijah Ephraim Jhirad, allegedly a Fugitive from the Justice of that country. At an extradition hearing a Magistrate must determine five things:

1. whether the extradition requisition is in proper form;

2. whether the offense charged is extraditable;

3. whether the person before the Court is the one accused of the crime;

4. whether there is probable cause for holding the accused for trial; and

5. is the extradition intended to punish the accused for offenses of a political nature.

Respondent was arrested in August of last year on a warrant issued upon an extradition complaint and has

been free on bail ever since. A pre-hearing motion to dismiss made by Respondent was denied. A writ of habeas corpus was also denied by Judge Duffy and is presently on appeal. The issues raised at that time were threefold:

First, an attack upon the procedural regularity of the requisition, claiming that no treaty exists between India and the United States. This issue was decided adversely to the Respondent thus disposing of the first of the issues normally decided at an extradition hearing.

The second issue raised preliminarily was whether the crime charged was extraditable. That issue was also decided adversely to the Respondent, thereby disposing of it.

The third issue was a defense of statute of limitations. It is fair to say that the decisions of this court and the district court were not entirely conclusive on that point, and it will be discussed separately later.

Of the remaining issues, the question of identity is easily disposed of. There has never been any real dispute, and indeed Respondent has taken the stand and acknowledged, that he was the former Judge Advocate General of the Indian Navy, and is obviously the person who is being sought by the Indian Government. The crucial issue, therefore, is the question of probable cause.

Respondent is charged with having embezzled 842,457 Rupees, which is approximately $165,000 in American money. Certain facts are uncontested. Mr. Jhirad was from 1947 through 1964 the Judge Advocate General of the Indian Navy. During 1964 he took a leave of absence. On July 26, 1966, he flew to Brussels with his family, where he attended a World Jewish Congress. From there he went to Geneva where he lived openly, entertaining foreign dignitaries including those of India. Some months later he immigrated to Israel and became an

Israeli citizen. He never returned to India and never again took up his post as Judge Advocate General. In June of 1971, he came to the United States on a visa, and obtained employment here.

In late 1958, during the time that Mr. Jhirad served as Judge Advocate General of the Indian Navy, a Prize Fund Account was set up. Between 1959 and September of 1961, Respondent was administrator of this Naval Prize Fund. The Fund had been set up for distribution to Indian Navy personnel who had served for more than 180 days during World War II, pursuant to a proclamation of the Indian Government issued on January 31, 1956, which announced the existence of the Prize Fund and called upon those eligible to participate to file their claims.

The exact amount to be paid to claimants could not be determined until such time as the total number of claimants and their ranks (which determined their relative share) had been established. When this was done, the funds available were to be divided amongst the eligible claimants according to their scale of distribution.

Respondent, in addition to being responsible for the overall administration of the fund, was personally responsible for the distribution of funds, was a co-signatory on all withdrawals from the fund, and was charged with seeing that the fund was properly administered and accounted for. Between February of 1959 and September of 1961 virtually all the fund of over $400,000 was disbursed. No formal audit of the account was ever made.

In 1966, as a result of an inquiry from a sailor, an inquiry was initiated concerning the distribution of the funds. (The Fund itself had been closed and the Respondent placed on leave a couple of years earlier.)

It was found that many of the books and records of the Fund had been already destroyed, and that the account could not be audited at that time. However, from those

records available, primarily the checks, it was established that Mr. Jhirad had drawn the bulk of the account, the equivalent of $275,000, out of the bank in cash. During this time period, large sums of cash were deposited to several personal accounts of the Respondent, and cash was used by him to pay various stockbrokers and commodity brokers. It was also established, however, that a number of the claimants were not paid by check, but by money orders and that these money orders were often purchased by cash.

A criminal investigation was commenced in July of 1966. The investigation had been underway only a few months when Mr. Jhirad left India never to return. In 1968, two years after he had left India, three "charge sheets" were filed against Mr. Jhirad. A charge sheet appears to be roughly equivalent to our Criminal Complaint. Each of these charges Mr. Jhirad with violation of Section 409 of the Indian Penal Code: criminal breach of trust by a public servant, an aggravated form of embezzlement punishable by ten years imprisonment and a fine.

The reason why three separate sheets were filed charging the same crime is that, under Indian criminal procedures, embezzlements may be treated as a single offense, but not for a period of more than one year. Consequently, the first charge involves alleged embezzlements between May of 1959 and May of 1960; the second involves alleged embezzlements between June of 1960 and June of 1961; and the third and final sheet charges alleged embezzlements between July and September of 1961.

Prior to seeking the extradition of Mr. Jhirad, a hearing was held before the Additional Chief Magistrate in India. A wealth of evidence, a number of witnesses and exhibits were presented to him. These exhibits and witnesses established beyond any doubt that Mr. Jhirad had transferred large sums of money from the Prize account

to his own accounts and personal uses. This was established by similarities of amounts withdrawn and deposits on the same dates, sometimes even in identical amounts and similar denominations of currency. It was an inescapable conclusion from the evidence and bank deposit analysis presented before the Indian Magistrate that monies had indeed been transferred from the Prize account to Mr. Jhirad's personal accounts.

The evidence before the Magistrate also tended to prove that Mr. Jhirad had lost heavily during the same period investing in the stock market and in commodities, and that he had personally ordered the destruction of the records without their having been audited.

All of the evidence presented before the Indian Magistrate was properly certified and presented to this court. Respondent contends that this evidence fails to establish probable cause since there is no proof that any part of the Naval Prize Fund is missing or that anyone entitled to share in the funds was not paid.

India attempted to prove that a number of former seamen who were entitled to participate in the Fund were not in fact paid. Their evidence was insufficient in that, although they showed that these persons were entitled to file claims against the Fund, there was no proof that they had in fact filed timely claims. However, it is not necessary to prove that a particular valid claimant was deprived of his proper payment. There are a number of ways to embezzle from a fund of this nature, but the most dangerous way would have been to have diverted payments due to eligible claimants, because this would almost certainly have raised a protest from them.

Other ways in which funds could have been embezzled were by enlarging the number of claimants by adding fictitious names, by miscomputing the amount to be paid to proper claimants, or by appropriating unclaimed funds

when claimants had died or disappeared following a submission of their claims. Other ways of tapping the fund surely exist, so it certainly is not necessary to show that the monies were taken from persons who had filed proper and timely claims. All that is necessary is to establish that assets were misappropriated by Mr. Jhirad.

Respondent cites *Tinsley* v. *Bauer,* 271 F.2d, 110 (Calif. 1954) for the proposition that the fact that a portion of the Fund is missing is irrelevant to Respondent's guilt. That was a civil case which involved an alleged embezzlement where the evidence merely established the placing of certain funds in the account of the bookkeeper. The Court held that this was an inadequate basis to establish the amount actually embezzled from the employer. The Court specifically distinguished the effect of such evidence in a criminal proceeding and held that it certainly would be some evidence of a criminal act. The Appellate Court returned that case to the trial court merely for a further determination as to what amounts had actually been taken from the company's accounts.

Respondent also contends that the transfer of funds from the Prize Fund, to the personal account of Mr. Jhirad, is not even evidence of criminal intent, citing *People* v. *Von Cseh,* 9 A.D. 2d 660 (1st Dept., 1959). In that case, however, the defendant had been specifically allowed to deposit the monies wherever he desired, including his personal account, and it was held that the embezzlement was committed not when he deposited the funds in his personal account, but when it was established that he removed the monies from those accounts and used them for his personal needs.

Criminal intent can be inferred from the nature of the conversion. In this case, the Respondent took the stand, admitted freely having withdrawn monies from the Prize Fund and having deposited them into his personal ac-

counts. His explanation was that he received substantial amounts of cash from his own private practice of the law and from his stock market transactions and he had it on hand, while he did not keep cash from the Prize Fund account. Consequently, on occasions when he had to obtain money orders and needed cash for that purpose, he testified that he advanced his own funds to make such purchases and subsequently repaid himself by making the transfers previously described.

There is a substantial question as to whether or not this defense can be considered at this time. It is clear that in an extradition hearing a Respondent cannot offer evidence which contradicts the evidence of the extraditing country. Here, however, the only evidence which clearly contradicts the evidence of the Government of India is Mr. Jhirad's testimony that he did not direct the destruction of the records of the Prize Fund, and, perhaps, his summary contention that his investments were profitable overall. To the extent that this evidence contradicts the evidence of the Government of India, I have ignored it.

This, however, does not solve the entire problem of the defense that the monies were transferred as a repayment for advances previously made. In the case of *Charlton* v. *Kelly,* 229 U.S. 447 (1913), the Supreme Court held, at p. 461:

> "There is not and cannot well be any uniform rule determining how far an examining magistrate should hear witnesses produced by an accused person. The proceeding is not a trial. The issue is confined to the single question of whether the evidence for the state makes a prima facie case of guilt sufficient to hold the party for trial.".

The Court held that evidence in the nature of a defense, in that case insanity, should not be heard by the committing Magistrate.

In *Collins* v. *Loisel,* 259 U.S. 309 (1922), a case relied upon by the Respondent to establish that the accused could testify to explain ambiguities or doubtful elements of the prima facie case, the Supreme Court explicitly upheld the exclusion of certain evidence as relating to a defense, citing *In Re Wadge,* 15 Fed. 864 (S.D.N.Y., 1883), that to allow defensive evidence at such a hearing would compel the Government seeking the extradition to be prepared for a full-scale trial and to produce all its evidence and witnesses, both on direct and rebuttal.

It is clear, however, from such cases as *Application of First National City Bank,* 183 F.Supp. 865 (S.D.N.Y. 1960) that Respondent is still allowed to explain ambiguities or doubtful evidence in the elements trying to establish a prima facie case. But it is difficult to say whether the testimony presented by Mr. Jhirad is simply an explanation of ambiguities, or whether it is a separate affirmative defense.

In *Hatfield* v. *Guay,* 87 Fed. 2d, 358 (1st Cir., 1937), evidence that an accused's false pretenses did not cause a payment to be made to him, since the foreign government did not rely on those allegedly false pretenses, was held to be a defense and not an explanation. Evidence of absence from the country, insanity, alibi, all of these have held to be defensive material.

In *First National City Bank* v. *Aristeguieta,* 287 F.2d 219 (2d Cir., 1960), it was held that the defenses available to an accused are extremely limited. Indeed, you can search the cases in vain for a single instance in which a defendant in an extradition proceeding was allowed to present a defense (other than one specifically set forth in the treaty as an exemption from extradition) which was considered allowable under the circumstances. I conclude, therefore, that the evidence presented by Mr. Jhirad is

more properly to be considered by a Court in India where all the evidence would be available and where India would be able to present its rebuttal evidence to meet his contention that the monies were transferred in repayment of advances made by him.

Moreover, even if this defense is properly considered at this time, the evidence is not conclusive on the question of probable cause. To put it mildly, the actions of the Respondent, even accepting his version, were extremely unwise. All lawyers appreciate the sanctity of trust funds. The transferring of these funds from trust accounts to his own use had to give an appearance of fraud. His explanation for this—the convenience of having funds available rather than going to the bank on various occasions, is not completely believable considering the frequency and proximity of these transfers.

For example, according to the evidence presented by the Government of India, on October 13, 1959, Mr. Jhirad withdrew 6,000 Rupees and on the same day deposited 4,500 to his own account. Two days later he withdrew 8,000 Rupees and deposited 7,900 to his account. On December 1, 1959, he withdrew 5,000 and deposited 4,700. Two days later, he withdrew 30,000 and deposited 10,000. On December 28, 1959, he withdrew 8,000 Rupees and deposited 7,600. Within a week thereafter he withdrew 4,000 and 6,000 and deposited identical amounts.

On April 6, 1960, he withdrew 50,000 and deposited slightly in excess of that. The following day he withdrew 20,000 and deposited the exact same amount.

On three consecutive days in September of 1960 he made large deposits following large withdrawals, and the amounts almost exactly coincide and a few days later there is another deposit of 15,000 Rupees following a withdrawal of 15,000.

The same sequence of events occurs in October of 1960, where over a period of a week there are four large withdrawals and four large deposits.

The same set of circumstances can be found in January of 1961, where over a four-day period there are three large withdrawals and three large deposits.

Coming to the charges involved in the last charge sheet, in July of 1961 and September of 1961, we find again a series of withdrawals and deposits separated by only a day or two each time.

It is extremely difficult to accept the contention that these withdrawals and deposits were made to repay advances. It would be purposeless to make withdrawals from the bank to repay advances made on the exact same days, or even on the intervening days.

I find, therefore, that there was probable cause for requiring Respondent to appear in India to answer some of the charges against him. This, however, does not dispose of all of the issues raised.

As I mentioned earlier, there is a question of limitations. It was held in *Hatfield* v. *Guay, supra,* that an exemption from prosecution by lapse of time is a matter of defense to be considered at trial unless specified in the treaty as a ground for declining extradition. Article 5 of the Treaty between the United States and India specifically makes a limitations defense grounds for declining extradition, if it is a bar to extradition under the laws of either country. The prior decisions of this Court and the District Court held that at least the last few transactions were not barred by the United States five-year statute of limitations. (India does not have a formal statute of limitations as such, and proceeds on a laches basis applied at the conclusion of the case and certainly of no help to Respondent at this juncture.)

The prior decisions left open the question of whether the entire embezzlement could be treated as a single offense, so that no part is time barred. As mentioned earlier the Indian Penal Code allows embezzlements to be treated as a single offense, but only up to the maximum of a one-year period.

India's legal expert testified that all of the three charges, covering a period of two years and four months, cannot be treated as a single offense. Therefore it appears that all of the transactions involved in the two oldest charge sheets are more than five years old and are time barred.

India argues that we should consider the law of the United States on this point, since we are applying the United States statutes of limitations. (There is some authority for treating embezzlement as a single continuing offense.) This argument overlooks the fact that we are applying our statute of limitations simply because the Treaty requires us to. Admittedly this engrafts onto the law of India a provision for which it does not have a similar equivalent. However, in looking at the crime itself, we are governed by the law of India for the nature and elements of the crime as well as its duration. Since India treats these as three separate offenses, and the first two are time barred, respondent may be extradited only on the last of the three charges against him.

This leaves a final issue. Respondent contends that he should not be extradited because he would not get a fair trial in India and, moreover, that his extradition is politically motivated. I have previously ruled that the first part of the question, concerning the fairness of the jurisprudence administered by the Indian Courts, is not properly before me. *In Re Neely,* 103 F. 631, (2d Cir., 1900), *affirmed,* 180 U.S. 109 (1901).

This leaves only the question of whether or not the prosecution here is barred because of its alleged political

motivation. Article 6 of the Treaty has some rather ambiguous language to the effect that the extradition will not be allowed if it is sought "with a view to . . . punish him for a crime or offense of a political character".

It is admitted that the offense itself is not of a political nature. It is contended, however, that the motivation of the Government of India in seeking this extradition is political, and that underlying motivations must be considered.

It is questionable whether the ambiguous language within the treaty allows us to examine the motives of the Government of India in seeking Mr. Jhirad's extradition. In any event, the evidence is insufficient to establish that prosecution and extradition are politically motivated.

The evidence did establish that Mr. Jhirad was an outspoken apostle of the cause of the new nation of Israel. He advocated friendship to India with Prime Minister Nehru, Khrishna Menon and other India leaders of the time. This was unpopular since India is aligned with the Arab bloc of nations. He testified that as a result of his political activities on behalf of Israel, he was subject to surveillance and to criticism from his superiors. Nevertheless, the evidence also establishes that he was allowed to continue to hold a high Government post; that he was not forced to retire, and indeed, was furnished with government quarters while on extended leave of absence; that he was bestowed with the title of Senior Advocate by the Bar Association; that his political activities were not inhibited to any noticeable degree; and, finally, he was allowed to leave India to attend a Jewish World Conference in Brussels. (This latter privilege was apparently an error on the part of the Indian government in light of the then pending criminal investigation.) I find, therefore, that the extradition is not politically motivated.

In conclusion, therefore, Respondent is ordered committed to the custody of the Attorney General; these findings including a transcript of evidence and exhibits taken herein will be certified to the Secretary of State for appropriate action. The motions of Respondent to dismiss the proceedings are denied.

So Ordered

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Gerard L. Goettel
United States Magistrate

Dated: New York, New York
April 12, 1973

Appendix E, Opinion and Order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1630

ELIJAH EPHRAIM JHIRAD,

Petitioner,

—against—

THOMAS E. FERRANDINA, United States Marshal for the Southern District of New York,

Respondent.

APPEARANCES:

TENZER, GREENBLATT, FALLON & KAPLAN, ESQS.
Attorneys for Petitioner
By Edward L. Sadowsky, Esq. and
Stacy L. Wallach, Esq.
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LOUIS STEINBERG, ESQ. and
EDWIN A. STEINBERG, ESQ.
Attorneys for the Government of India

WILLIAM R. BRONNER, ESQ.
Assistant United States Attorney,
For Respondent Ferrandina

KEVIN THOMAS DUFFY, D. J.

Elijah Ephraim Jhirad petitions for a writ of habeas corpus. This is the second writ sought by petitioner in

this very protracted and complicated extradition matter. In an earlier opinion *Jhirad* v. *Ferrandina,* 355 F. Supp. 1155 (S.D.N.Y. 1973), I denied Jhirad's first petition, which was brought before a hearing could be held by the magistrate. The facts of this case are set out in great length in the prior opinion, and I shall only briefly reiterate them here.

The Government of India (the real respondent to this action) has sought the extradition of petitioner Jhirad pursuant to 18 U.S.C. §§ 3182 and 3184. India contends that Jhirad, while Judge Advocate General of the Indian Navy, embezzled a substantial sum of money from a prize fund set up to recompense naval veterans, which he administered.

The normal scenario of events in an extradition case begins with the issuance of a warrant for the detention of the alleged fugitive. Thereafter, the magistrate holds a hearing to determine whether the party before him is in fact the party sought and, if so, whether or not the requesting government can demonstrate probable cause that the fugitive committed an extraditable offense. The decision of the magistrate is not directly appealable; however, it can be attacked by means of a writ of habeas corpus. *Sayne* v. *Shipley,* 418 F. 2d 679 (5th Cir. 1969), *cert. denied,* 398 U.S. 903 (1970). Unfortunately, the procedure in this case was somewhat different. Petitioner Jhirad brought his first petition before the magistrate had held his hearing. Reluctantly, this Court felt constrained to decide the merits of petitioner's claims before the hearing because of the prolonged pendency of the petition. Of necessity, this course of events further limited the narrow scope of review of an extradition matter normally open to a court on a petition for habeas corpus,[1] since no issues regarding the magistrate's decision could be presented in the first petition.

While denying the first petition, this Court held that the Treaty of 1931, 47 Stat. 2122, between Great Britain and the United States, acceded to on behalf of India in 1942, was a valid existing treaty of extradition between India and the United States which supported an exercise of jurisdiction by the magistrate. In addition, it was held that the offense charged against Jhirad came within the offenses enumerated as extraditable in the Treaty. Lastly, this Court held that under the Treaty of 1931, extradition otherwise permissible could not take place if the statute of limitations of India or the United States would bar prosecution of the charged offense. However, the Court rejected petitioner's assertion that either the applicable United States Statute of Limitations, 18 U.S.C. 3282, or the applicable Indian principle of laches would prevent the prosecution of Jhirad.

Jhirad in his present petition raises three major issues which he asserts foreclose extradition. I now turn to a discussion of those issues.

Jhirad strenuously requests that this Court reconsider its original determination that some of the charged offenses allegedly committed by Jhirad are *not* time barred by 18 U.S.C. § 3282, the relevant United States Statute of Limitations. Under 18 U.S.C. § 3282 there is a five year period of limitation from the time of the alleged offense within which the accused must be indicted. It is uncontroverted that the Government of India did not institute action against Jhirad until nearly seven years after the last alleged offense. Unless, therefore, the period were tolled, these charges would not support extradition. However, this Court held that under 18 U.S.C. 3290, the time period was tolled on July 26, 1966, when Jhirad left India. 18 U.S.C. § 3290 tolls the running of the Statute of Limitations when the alleged offender is a "fugitive from justice". The focus of petitioner's attack is this Court's determination that Jhirad's mere absence from India tolled the statute regardless of his motive or intention.

As was stated in this Court's first decision, the circuits are divided as to the meaning of "fugitive from justice" in Section 3290. One line of cases holds that to constitute a fugitive from justice, it must be shown that one was absent from the jurisdiction where the crime was committed and, in addition, that the fugitive intended to avoid prosecution or evade the jurisdiction of the local courts. *Donnell* v. *United States,* 229 F. 2d 560 (5th Cir. 1956); *Brouse* v. *United States,* 68 F. 2d 294 (1st Cir. 1933); *Greene* v. *United States,* 154 F. 401 (5th Cir. 1907), *cert. denied,* 207 U.S. 596 (1907); *Porter* v. *United States,* 91 F. 494 (5th Cir. 1898). The other line of cases holds that the mere absence of the defendant from the jurisdiction is sufficient to constitute a fleeing from justice and thus to toll the Statute of Limitations. *King* v. *United States,* 144 F. 2d 729 (8th Cir. 1944), *cert. denied,* 324 U.S. 854 (1945); *McGowan* v. *United States,* 105 F. 2d 791 (D.C. Cir. 1939), *cert. denied,* 308 U.S. 552 (1939); *Greene* v. *United States,* 188 F. 2d 48 (D.C.Cir. 1951), *cert. denied,* 341 U.S. 955 (1951); *In re Bruce,* 132 F. 390 (D.Md. 1904), *aff'd sub nom. Bruce* v. *Bryan,* 136 F. 1022 (4th Cir. 1905). This Court adheres to its earlier decision following the latter line of cases.

It is important to remember the context within which this decision must be made. This is an extradition case, involving activity which has taken place half-way around the world. The extradition procedures afforded by statute seek to preserve an element of judicial surveillance over a procedure which is basically an action of international comity. Of necessity, a fugitive is not given a full trial on the issue of his guilt. In fact, the procedures fall strikingly short of a full trial. It would be most difficult for a court in one jurisdiction to seek to determine factual issues arising in another distant jurisdiction. Undoubtedly, this

constitutes the rationale for requiring that the demanding country to support extradition merely prove reasonable grounds to believe the fugitive guilty. These same factors persuade this Court that to apply a test requiring a showing of intent, at best a difficult issue of fact, for an act occurring in a distant land, would be most inappropriate.

In seeking to have this Court change its earlier position, petitioner has attempted to demonstrate that Congress desired that an intent to avoid prosecution be proved in order to satisfy the fleeing from justice requirement of Section 3290. The petitioner's argument, quite novel and ingenious, is based on an analysis of the terms "fugitive from justice" and "absent from the district" as used in the Internal Revenue Codes of 1939 and 1954, each of which has its own statute of limitations. The Statute of Limitations, 26 U.S.C. § 3748, included within the 1939 Code was tolled when a person committing the alleged offense was *absent* from the district. When the 1954 Code was enacted, Congress chose to toll its Statute of Limitations, 26 U.S.C. § 6531, when the person committing the alleged offense is outside the United States or is a fugitive from justice within the meaning of 18 U.S.C. § 3290. Also, at this time, Congress amended the Code of 1939 § 3748, to delete[2] the mere absence standard, substituting the fleeing from justice standard.

It is argued therefore that Congress clearly distinguished between mere absence and fleeing from justice, and that Congress intended fleeing from justice in the tolling provision, 18 U.S.C. § 3290, to require a showing of intent to be operative.[3] Interesting as this argument is, it is of very little relevancy what Congress meant when it enacted the Internal Revenue Codes, when the issue before the Court is the meaning of a phrase in a different statute, regardless of how similar are the statutory sections.

The general statute of limitations containing the phrase "fugitive from justice" has existed for many years prior to the enactment of the 1954 Code. Congress' intent in 1954 regarding a phrase in one Statute is not of controlling import in determining what the same phrase was intended to mean in a different statute enacted by a Congress more than 60 years before. In addition, a majority of courts faced with divining the meaning of "fugitive from justice" in 18 U.S.C. § 3290, and its predecessor statute 18 U.S.C. § 583 held that Congress had not required a showing of intent.

Petitioner's argument fails for another reason. Even though the phrase "fugitive from justice" as contained in 26 U.S.C. § 6531 may have been interpreted as not being an operative tolling provision unless an intent to flee was proven, it is important to note that the phrase applies only to intra United States flights. Under 26 U.S.C. § 6531, the time for commencement of a tax action is tolled

> "during [the period when] the person committing one of the various offenses . . . is outside the United States or is a fugitive from justice."

In those cases where a defendant in a tax suit has been outside the country during the period following the alleged offense, most courts have held that the time period within which to bring an action is tolled by the mere absence from the country of the accused. *U. S.* v. *Foster,* 197 F. Supp. 387 (D.Md. 1961), *rev'd on other grounds,* 309 F. 2d 8 (4th Cir. 1962); *U. S.* v. *Myerson,* 368 F. 2d 393 (2nd Cir. 1966), *cert. denied,* 386 U.S. 991 (1967); *U. S.* v. *Jurzykowski,* 159 F. Supp. 7 (N.D.N.Y. 1957).

Thus, under the tax laws there are two separate standards, one for intra-country absences and another for absences from the country. It should be noted that § 3290 applies to both intra- and extra- U. S. flights from

justice. It would be highly inconsistent to attempt, as petitioner has sought, to infuse the words "fleeing from justice" in § 3290, where they have a broader application, with the meaning that the words have acquired as narrowly used in the tax code, 26 U.S. § 6531. This is particularly true in light of the fact that in the present case the term "fleeing from justice" must be interpreted in circumstances where the alleged offender has not merely moved from one jurisdiction within a country to another but has, in fact, left his homeland. It is for these reasons that this Court adheres to its earlier opinion that as to the last three charged offenses included in the third charge sheet presented by India to the Magistrate, the applicable statute of limitations has been tolled by § 3290.[4]

The second argument made by Jhirad in his petition is that extradition is being sought by India to punish petitioner for political activity and thus extradition is barred by Article Six of the Treaty of 1931, which is as follows:

> "A fugitive criminal shall not be surrendered if the crime or offense in respect of which his surrender is demanded is one of a political character or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offense of a political character." Art. 6, Treaty of 1931, 47 Stat. 2122.

Article Six appears to set forth two separate tests by which to determine whether the person sought for extradition is being properly sought by the demanding country. There was no attempt by petitioner at the hearing before Magistrate Goettel to demonstrate that the offenses charged were political in character, nor has this claim been made in this petition. The Magistrate, though uncertain as to whether, in fact, this article mandated that he must weigh evidence on the question of whether India's

action against Jhirad was politically motivated, nevertheless heard evidence on the question and held that petitioner had failed to prove such political animus. A fair reading of the Treaty compels the conclusion that this Treaty creates a prohibition against politically motivated extradition, and therefore the Magistrate properly allowed evidence to be presented on this issue.

In *Ornelas* v. *Ruiz,* 161 U.S. 502 (1896), the Supreme Court was asked to review a District Court's determination that a magistrate did not have jurisdiction to extradite an accused because the acts allegedly done were political and as such were immunized by the relevant treaty of extradition. In setting down the standard for review of a magistrate's determination, Mr. Chief Justice Fuller, speaking for the Court, indicated that a writ of habeas corpus was not a writ of error and that the District Court could only inquire whether "there was legal evidence on which the magistrate might properly conclude the accused had committed offenses within the Treaty as charged."

The language of Article Six makes it clear that the burden of proof rests on the petitioner to show that India's demand is being made to punish him for political activities. I find that the Magistrate was correct in concluding that petitioner had failed to prove his contention. The only evidence offered by petitioner in support of his argument was that Jhirad was an outspoken advocate of the State of Israel, in a country firmly committed to the Arab bloc; that certain Government officials had warned him about his activities; and that he was supposedly under surveillance by some Government agencies. However, this alone is not enough to demonstrate that *this* request for extradition is motivated by India's animosity for Jhirad's pro-Israel sentiments. Petitioner has shown no evidence regarding the circumstances of this investigation of Jhirad or his indictment in India, which shows political motiva-

tions. Indeed, as the Magistrate pointed out in his opinion, negating the inference of strong animosity toward Jhirad is the fact that at the very time he was allegedly chastized and under surveillance for his pro-Israel feelings, he held the highest civilian office in the Indian Navy; he was allowed to attend several World Jewish Conferences (in fact that was his destination on his final departure from India); and he was bestowed with the honor of designation as Senior Advocate by the Indian Bar Association. Petitioner has failed to prove that political motivation lurks behind this demand for extradition. Thus, it is clear that Article Six does not prohibit the extradition of Jhirad for his alleged offenses.

Lastly, I turn to petitioner's contention regarding the evidence produced at the hearing before the Magistrate. Under 18 U.S.C. § 3184, a magistrate is empowed to conduct a hearing to determine, among other things, whether there is evidence sufficient to sustain the charge under the provisions of the appropriate treaty. Article Nine of the Treaty of 1931 states that

> ". . . extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, . . . to justify the committal of the prisoner for trial, in case the crime or offense had been committed in the territory of such High Contracting Party . . ."

Mr. Justice Brandeis, in *Collins* v. *Loisel,* 259 U.S. 309 (1920), while interpreting an article in an earlier treaty of extradition with Great Britain,[5] different in form but similar in substance to Article Nine, held that the treaty required that the magistrate find evidence sufficient "to block out those elements essential to a conviction." The test to be applied by the magistrate has been variously stated, but all courts in substance make clear that the magistrate does

not inquire into the guilt or innocence of the accused, but looks only to see if there is evidence sufficient to show a reasonable ground to believe the accused guilty. *Wacker* v. *Bisson,* 370 F. 2d 552 (5th Cir. 1967), *cert. denied,* 387 U.S. 936 (1967). Indeed, it has been said the foreign country need only show probable cause that the fugitive is guilty. *Factor* v. *Laubenheimer,* 290 U.S. 276 (1933); *Charlton* v. *Kelly,* 229 U.S. 447 (1913).

Before determining whether there was reasonable cause to believe the fugitive is guilty, it is first necessary to determine whether there is reasonable cause to believe a crime was committed. In determining whether a crime was committed, the magistrate apparently assumed that what must be proved were the elements of the crime of embezzlement as defined by the law of New York State. Though the language of Article Nine could be read to indicate that Federal law should be applied, it seems clear that New York law as to embezzlement ought to be the source for these necessary elements.[6] The magistrate found that there was probable cause that a crime had been committed and that there were reasonable grounds to believe that the petitioner was guilty of that crime.

There is only a limited review of the magistrate's finding of probable cause open to this Court. In a petition for a writ of habeas corpus, Mr. Justice Holmes, speaking for the Supreme Court in *Fernandez* v. *Phillips,* 268 U.S. 311 (1925), described the limitations on review in the following way:

> ". . . habeas corpus is available only to inquire . . . whether there was *any evidence,* warranting the finding that there was reasonable ground to believe the accused guilty." [emphasis added] 268 U.S. at 312.

See also, *McNamara* v. *Henkel,* 226 U.S. 520 (1913); *Jiminez* v. *Aristeguieta,* 311 F. 2d 547 (5th Cir. 1962), *cert. denied, Jiminez* v. *Hixon,* 373 U.S. 914 (1963). The evi-

dence is thoroughly reviewed by Magistrate Goettel in his opinion, and the analysis need not be repeated. I hold that there was evidence as to all the elements material in showing the crime of embezzlement and that there is reasonable ground to believe that the petitioner is guilty of that crime.

The crime of embezzlement under New York law, now included as a form of larceny in § 155.05 Penal Law (McKinney 1965) is committed when a person who, having money or property in his possession as attorney, fiduciary, etc., appropriates such money to his own use or the use of other than the lawful owners. See *People* v. *Gibson,* 218 N.Y. 70, 112 N.E. 730 (1916). Both sides agree that petitioner was the administrator of the Naval Prize fund from the moment the fund was set up in late 1958 until it was closed in 1962. And the petitioner does not dispute the evidence introduced by India which shows that checks written on the Prize Fund were cashed by Jhirad and deposited in his own account, sometimes in toto and at other times in smaller amounts.

Jhirad admits that all of the records of the Prize Fund were destroyed without an audit. But he argues that there is no evidence that any rightful claimant to the fund had been deprived. The Magistrate rejected evidence presented by India showing the names of allegedly unpaid claimants to the Fund. Such a determination is within the province the Magistrate and not subject to review on habeas corpus. Further, this Court agrees with the Magistrate's conclusion that India did not have to show that someone entitled to a share was not paid. The evidence presented to the Magistrate demonstrated that Jhirad appropriated money to his own use over which he maintained only fiduciary control. It is not necessary that an individual unpaid claimant be brought forth, since there was evidence presented which demonstrates that the money was not Jhirad's. If the money did not belong to a claimant, then it must revert

back to the authorizing unit, certainly not to the fiduciary who administered it. For probable cause to be shown, it is necessary only that there be evidence that the money was not Jhirad's, rather than, as petitioner has suggested, that there be evidence that the money was the property of a particular person.

Petitioner cites *People* v. *Von Cseh,* 9 App. Div. 2nd 660, 191 N.Y.S. 2d 699 (1st Dept. N.Y. 1959), for the proposition that the mere deposit of money over which one is trustee into one's own bank account is not evidence of the intent necessary for embezzlement. Upon careful examination, the Von Cseh case is seen as merely standing for the proposition that where the fiduciary is *expressly* given *absolute* discretion as to the deposit of money, more must be shown to indicate a felonious intent. In this case, there was no evidence that Jhirad was given the discretion to deposit money as he saw fit. Thus, it seems to me that the deposit of money in the bank is sufficient evidence of such an intent to satisfy probable cause.

The Magistrate was hesitant about permitting the petitioner to introduce evidence which allegedly showed that some claimants were paid with money orders purchased by cash which allegedly was advanced by Jhirad. The law is somewhat unclear as to what evidence a fugitive can advance at the hearing. *Charlton* v. *Kelly, supra,* 229 U.S. 447 (1913). The Second Circuit in *U. S. ex rel. Petrushansky* v. *Marasco,* 325 F. 2d 562, (2nd Cir. 1963), *cert. denied,* 376 U.S. 952 (1964), stated the rule in the following way:

> "Although at a hearing of this type a fugitive has a right to introduce evidence, the right is limited to testimony which explains rather than contradicts the demanding country's proof, and its precise scope is largely in the Commissioner's discretion." 325 F. 2d at 567.

The line between an explanation and a contradiction is a narrow and sometimes invisible one. It appears proper that the Magistrate allowed this evidence to be presented. The evidence as regards Jhirad's justification does serve to explain the deposit of moneys in petitioner's account. Even with this explanatory evidence, however, there is sufficient evidence to show probable cause. As the Magistrate properly pointed out, whatever evidence Jhirad presented to show that the transfer of money from the fund to his account was merely a repayment for funds advanced because of the inconvenience of having to go to the bank to cash Fund checks and then to pay for the postal orders, was negated by the fact that petitioner on many occasions would for several days in a row withdraw large amounts from the Fund and deposit them in the bank, and then make further withdrawals from the bank. It strikes me that these frequent trips to the bank often in the same day represent the height of inconvenience.

The Magistrate may have erred in disregarding the evidence introduced by petitioner that he made a substantial profit in one commodity brokerage account which he kept. However, this exclusion is not of great importance. As the Supreme Court indicated in *Charlton* v. *Kelly, supra,* 229 U.S. 447 (1913), the erroneous exclusion of other evidence will not render the detention illegal, so long as there remains enough competent evidence to sustain the burden of establishing probable cause. Even accepting petitioner's evidence, the net result of his market activities is a profit which compared to his alleged advances seems minute, and thus not of persuasive force in serving as a source of cash for the alleged advances.

Finally, petitioner seeks to object to the Magistrate's refusal to credit petitioner's evidence that it was not he who ordered the destruction of the records of the Prize Fund. Under the test of *Petrushansky,* this evidence would

seem to be contradictory, not explanatory, and thus I find it properly excluded. It is important to note that the evidence does not have to show guilt, but need only show probable cause or a reasonable belief that the petitioner was guilty of the crime for which extradition is sought. I conclude that there was evidence to support the Magistrate's finding.

For the above reasons, the petition for the writ of habeas corpus is denied.

So Ordered.

_____

U. S. D. J.

Dated: New York, New York
June 8, 1973.

FOOTNOTES

[1] The scope of inquiry open to a district court when deciding a writ of habeas corpus in an extradition case is very narrow, being limited to the following questions:

2) Whether the offense alleged is a treaty offense, and

3) Whether there was substantial evidence produced at the hearing to support the magistrate's determination that there were reasonable grounds to believe the accused guilty of the alleged offense.

Wacker v. *Bisson*, 348 F. 2d 602 (5th Cir. 1965); *Sayne* v. *Shipley*, 418 F. 2d 679 (5th Cir. 1909), *cert. denied*, 398 U.S. 903 (1970); *U. S. ex rel Petrushansky* v. *Marasco*, 215 F. Supp. 953 (S.D.N.Y. 1963), *aff'd* 325 F. 2d 562 (2nd Cir. 1963) *cert. denied*, 376 U.S. 952 (1964).

[2] The "absent from the district" standard was in fact not totally deleted but after 1954 was to apply only in prosecutions of alleegd violations of the 1939 Code occurring prior to 1954.

[3] At least one court has suggested that the difference in the language of the tolling provision in the 1939 and 1954 Internal Revenue Codes resulted from an enlargement of the scope of federal criminal jurisdiction from districtwide to nationwide. *United States* v. *Foster*, 197 F. Supp. 387 (D.Md. 1961).

[4] Dealing with the other charge on the last sheet, the Magistrate held in his decision, relying on § 222 of the Indian Penal Code, that the Statute of Limitations had not run as to the last four charged offenses since they constituted one inclusive offense whose last act occurred less than five years before Jhirad left India. This analysis is not without some merit. However, this Court, relying on the testimony of Mr. Mehta, an expert on Indian law, called by the Government of India at the hearing, feels constrained to hold that the four offenses do not constitute one offense nor have they been treated as one offense within the meaning of the statute, but must be dealt with individually. Thus, only the last three charged offenses are not time barred.

[5] The Treaty of 1931, 47 Stat. 2122, originally was made between the United States and Great Britain, and it included a provision which allowed Great Britain to accede to the Treaty on behalf of certain designated territories then under British control. The Treaty was acceded to on behalf of India in 1942, and was found to support jurisdiction here in *Jhirad* v. *Ferrandina*, 355 F. Supp. 1155 (S.D.N.Y. 1973).

[6] The Second Circuit in *Shapiro* v. *Ferrandina*, Slip Op. 702, (2nd Cir. April 6, 1973) held that a clause in another extradition treaty similar in content to Article Nine referred to state law to define the elements of the charged crime for the purpose of seeing if a prima facie case was made out. See also *Wright* v. *Henkel*, 190 U.S. 40 (1903); see also *Pettit* v. *Walshe*, 194 U.S. 205 (1904).

Appendix F, Order of Reversal.

United States Court of Appeals

for the Second Circuit

Nos. 1113-1114 - September Term 1972

(Argued July 20, 1973 Decided October 24, 1973)

Docket Nos. 73-1126
73-1924

Elijah Ephraim Jhirad,

Appellant,

v.

Thomas E. Ferrandina, United States Marshal, Southern District of New York,

Appellee.

Before: Hays and Oakes, C.JJ., and Tyler, D.J.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Kevin T. Duffy, *Judge,* denying two applications for writs of habeas corpus.

Reserved and remanded.

Edward L. Sadowsky, New York, New York (Tenzer, Greenblatt, Fallon & Kaplan, on the brief), *for Appellant,*

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* Of the United States District Court for the Southern District of New York, sitting by designation.

Appendix F, Order of Reversal.

Louis Steinberg, New York
New York (Edwin A. Steinberg, on the brief), for the Government of India,

William R. Bronner, New York,
New York (Christopher Roosevelt, Assistant United States Attorney, on the brief), *for Appellee.*

Hays, Circuit Judge:

This is a consolidated appeal from two orders of the United States District Court for the Southern District of New York denying the appellant's petitions for writs of habeas corpus in an international extradition proceeding. On the request of the government of India, the appellant, the former Judge Advocate General of the Indian Navy, was arrested on the charge that he embezzled a portion of a Naval Prize Fund with the administration of which he had been entrusted. The government of India sought extradition under a treaty made in 1931 between the United States and Great Britain at a time when India was a dominion of Great Britain. The treaty was applied by Great Britain to India in 1942. In 1950 India achieved independence. Somewhat later, in 1967, the validity of the treaty as a treaty between the United States and India was confirmed by an exchange of notes between the State Department of the United States and the government of India.

Initially, the complaint against the appellant alleged 52 separate embezzlements of the Naval Prize Fund. The Naval Prize Fund was derived from a grant by Great Britain of a portion of the proceeds of naval prizes of war captured in World War II. The Fund was to be distributed to the officers and men qualified for such distribution by reason of having served at sea for a certain amount of time during the war. In 1958 Great Britain transferred

the sum of 1,973,679 rupees to the Indian Navy for distribution. The Fund thus established was to be administered by three Naval officials, including the appellant. The charges brought by the Indian Government against the appellant alleged that he had withdrawn cash from the Fund and deposited it in his personal account. The charges alleged that the acts of embezzlement took place between 1959 and 1961. The Fund was exhausted in December, 1961. The appellant continued in his office as Judge Advocate General of the Indian Navy until 1964. From 1964 until 1966 the appellant remained in India receiving half pay and residing in a home furnished by the Indian Government. In July, 1966 the appellant left India, residing first in Switzerland, then in Israel, and finally arriving in the United States where he was granted a permanent resident visa. The charges against him were not brought until 1968, two years after he left India, and well over five years from the date of the last alleged act of embezzlement (September 27, 1961).

The period of time which elapsed between the date of the alleged offenses and the prosecution of charges by the government of India gives rise to the major legal challenge raised by the appellant on this appeal. Appellant contends that extradition is barred by the statute of limitations. For non-capital offenses, 18 U.S.C. § 3282 establishes a five year statute of limitations.[1] More than five years passed before the charges were brought by the government of India. However, 18 U.S.C. § 3290 provides that the statute of limitations "shall [not] extend to any person fleeing from justice." The district court found that 49 of the 52 charges brought against the appellant were barred by the statute of limitations, since with respect to them five years passed while the appellant remained in India. However, for the last three counts, the district court found that although five years had passed,[2] the statute was tolled under

the provisions of 18 U.S.C. § 3290 because the appellant had fled from justice. In making this finding, the district court held that mere absence from India was sufficient to constitute "fleeing from justice" within the meaning of 18 U.S.C. § 3290. The appellant contests this construction, arguing that an intent to flee to avoid prosecution must be shown before the statute of limitations is tolled.

Since we are persuaded that the extradition treaty under which the government of India is attempting to extradite the appellant is valid as between the United States and the Republic of India.[3] we must decide whether the district court was correct in interpreting the phrase "fleeing from justice" so as to include a situation in which no intention to flee to avoid prosecution was proved.

Section 3290 of Title 18 of the United States Code provides simply that:

> "No statute of limitations shall extend to any person fleeing from justice."

The appellant contends that the phrase "fleeing from justice" means that the government must prove that the individual left the place where the offense occurred with the intention of avoiding arrest or prosecution. The district court rejected this construction, finding that mere absence from the place of the offense would suffice to prove "fleeing from justice."

There is a direct conflict among the Circuits on the point in issue. The Fifth Circuit has clearly held that mere absence is not sufficient to show "fleeing from justice" and flight with intent to avoid arrest or prosecution must be proved. In *Donnell* v. *United States,* 229 F.2d 560, 565 (5th Cir. 1956), the court held that:

> ". . . in determining whether a person charged with crime will be denied the right to be protected by the statute of limitations, the purpose and intent of his

> absence is an important matter to be inquired into under the plain words of the statute and the decisions discussed."

The court based its conclusion on "the plain wording of the statute" and on the Supreme Court ruling in *Streep* v. *United States,* 160 U.S. 128 (1895). In *Streep* the Court did not rule directly on the point presented in *Donnell* and in the case before this court. However, the Fifth Circuit in *Donnell* found that:

> "[i]n affirming, the Supreme Court held that it was unnecessary that a person have in mind avoiding the justice of any particular court in order to be a fugitive within the meaning of the statute. Nevertheless, it was clearly recognized that the general intention of the defendant in leaving the jurisdiction is material and is an indispensable aspect in considering whether he was, while outside the jurisdiction, a fugitive from justice." 229 F.2d at 562.

The Fifth Circuit had reached a similar conclusion concerning the construction of the phrase "fleeing from justice" in two previous cases, *Porter* v. *United States,* 91 F. 494 (1898) and *Greene* v. *United States,* 154 F. 401 (5th Cir.), cert. denied, 207 U.S. 596 (1907).

The First Circuit adopted the same position in *Brouse* v. *United States,* 68 F.2d 294 (1st Cir. 1933), stating:

> "[t]he essential characteristic of fleeing from justice is leaving one's residence, or usual place of abode or resort, or concealment one's self, *with the intent to avoid punishment.*" Id. at 295 (emphasis added).

On the other hand, the Eighth and the District of Columbia Circuits have construed the phrase "fleeing from justice" differently, holding that mere absence from the place of the offense is sufficient to toll the statute. See

King v. *United States,* 144 F.2d 729 (8th Cir.), cert. denied, 324 U.S. 854 (1944); *McGowen* v. *United States,* 105 F.2d 791 (D.C. Cir.), cert. denied, 308 U.S. 552 (1939).

This court has never directly passed on the issue. We now hold on the basis of the plain language and the purpose of Section 3290 that the government must show an intent to flee from prosecution or arrest before the statute of limitations is tolled. As the court noted in *Donnell,* supra, the phrase "fleeing from justice" carries a common sense connotation that only those persons shall be denied the benefit of the statute of limitations who have absented themselves from the jurisdiction of the crime with the intent of escaping prosecution. It does not appear to us to be unreasonable to provide for tolling of the statute of limitations when a person leaves the place of his alleged offense to avoid prosecution or arrest and for not tolling the statute when a person without such purpose of escaping punishment merely moves openly to another place of residence.

We think that the language of the Supreme Court in *Streep* v. *United States,* supra, supports this construction as the court pointed out in *Donnell,* 229 F.2d at 562-3.

Since the district court found that mere absence was enough to toll the statute of limitations, it did not make a finding on the intent of the appellant in leaving India. We are asked by both sides to rule on the basis of the evidence submitted below on whether the appellant fled from India with the intent to avoid prosecution, though the parties themselves reach opposite conclusions on the issue. We decline to make such a determination and, while reversing the decision, remand the case to the district court to make findings on the issue of intent.

Reversed and remanded.

Appendix F, Order of Reversal.

FOOTNOTES

[1] 18 U.S.C. § 3282 (1970) provides:

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years after such offense shall have been committed."

[2] According to the appellant's brief, the appellant left India on July 26, 1966. The statute of limitations on the last three counts would have expired on August 29, September 26 and September 27, 1966.

[3] As the district court noted, the position of the Executive Branch, the actions of both governments, and the historical continuity between British India and the Republic of India support the continued validity of the treaty. *Jhirad* v. *Ferrandina,* 355 F. Supp. 1155, 1159-61 (S.D.N.Y. 1973).

Appendix G, Opinion and Order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed
U.S. District Court
Jan 30 4 38 PM '74
S.D. of N.Y.

#40304

72 Civ. 4026

73 Civ. 1630

ELIJAH EPHRAIM JHIRAD,

Petitioner,

—against—

THOMAS E. FERRANDINA, UNITED STATES MARSHAL,
SOUTHERN DISTRICT OF NEW YORK,

Respondent.

APPEARANCES:

TENZER, GREENBLATT, FALLON & KAPLAN, ESQS.
Attorneys for Petitioner
By: Edward L. Sadowsky, Esq.
Of Counsel

EDWIN A. STEINBERG, ESQ.
LOUIS STEINBERG, ESQ.
Attorneys for Government of India.

KEVIN THOMAS DUFFY, D.J.

The pending order to show cause presents but another development in this international extradition case by which the government of India seeks the return of petitioner Jhirad to stand trial on the charge of embezzling a portion of a Naval Prize Fund which he had previously administered. After a Section 3184 hearing, Magistrate Goettel found that there was probable cause for the requested extradition. However, the petitioner asked this Court to prevent the extradition on the basis that the applicable five year statute of limitations had run. Holding that the statute was tolled by mere absence from the jurisdiction, regardless of the petitioner's intent in leaving, I denied two writs of habeas corpus. The tolling question was one of first impression in this Circuit, and on appeal the Court reversed, holding that intent to flee from justice must be found in order to toll the statute. The case was therefore remanded so that findings of fact could be made as to Jhirad's "intent" at the time he left India.

Thus the matter was once again before Magistrate Goettel, who had handled the original hearing so expertly, for a further development of the intent question. In a letter dated January 7, 1974, the Magistrate informed the parties that witnesses from India would be available on January 29, 1974, and advised the parties to be present on that date for a continuation of the proceedings. Upon receipt of that letter and another letter of the same date from the attorneys for the government of India, counsel for Jhirad brought an order to show cause seeking to bar the taking of any further evidence in this case or, in the alternative, seeking additional discovery. I signed the order to show cause on January 17, 1974, and held a hearing on January 24, 1974.

Petitioner's first contention is that "the District Court has no power to take additional evidence under the man-

date from the Court of Appeals." Affidavit of Edward L. Sadowsky, p. 3. In remanding, the Court of Appeals stated:

> "We are asked by both sides to rule on the basis of the evidence submitted below on whether the appellant fled from India with the intent to avoid prosecution, though the parties themselves reach opposite conclusions on the issue. We decline to make such a determination and, while reversing the decision, remand the case to the District Court to make findings on the issue of intent."

Jhirad v. *Ferrandina* (2d Cir., October 24, 1973) 73 Civ. 5515, 5521. Petitioner interprets the absence of any reference to the taking of further evidence as a direction by the Court of Appeals that no further evidence is to be taken. I disagree. The fact that the Court remanded the case without explicitly addressing itself to the need for taking additional evidence does not constitute a prohibition against taking such evidence. In declining to decide the factual issue of intent, the Court noted that "the parties themselves reach opposite conclusions on the issue." *Id.* at 5521. Had the Court seen no need for additional evidence, there would have been no purpose in declining to make the determination itself or in remanding the case to the District Court.

Furthermore, such law as may be found in the area of extradition also favors the taking of additional evidence. Unfortunately, as the Second Circuit has aptly stated, "Neither statutes nor decided cases furnish satisfactory guides as to procedures for obtaining proof upon extradition proceedings." *First Nat'l City Bank* v. *Aristeguieta*, 287 F.2d 219, 222 (2d Cir. 1960), vacated as moot, 375 U.S. 49 (1963). Though "satisfactory guides" in this area may be sparse, the Fifth Circuit has ruled that: "Unique rules

of 'wide latitude' govern the reception of evidence in Section 3184 hearings." *Sayne* v. *Shipley,* 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied,* 398 U.S. 903 (1970) (citations omitted). Thus, under the "wide latitude" standard I find that further evidence can be taken in this case and I deny the request to bar its admission.*

Petitioner's alternative request is for further discovery and he lists eight items or admissions which he believes he is entitled to discover. Affidavit of Edward L. Sadowsky, pp. 6-7, par. 18. These requests are very comprehensive; for example, the third item asks for "[i]nspection of the petitioner's personnel file with the Indian navy."

I find that the granting of these discovery requests would clearly extend the scope of an extradition hearing well beyond its intended and limited purpose and would be an unwarranted excursion into the jurisdiction and province of the requesting country. Petitioner's requests for discovery must be seen as an attempt to have the entire case tried here and, as the Supreme Court has stated, "[t]he function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and *not to determine whether the evidence is sufficient to justify a conviction.*" *Collins* v. *Loisel,* 259 U.S. 309, 316 (1922) (emphasis added). See also *Grin* v. *Shine,* 187 U.S. 181, 197 (1902); *Benson* v. *McMahon,* 127 U.S. 457, 461-62 (1888).

Lower federal courts have also traditionally warned against allowing too extended discovery in extradition proceedings for fear that the hearing would be transformed into a full trial of the merits. As early as 1883 this District Court realized that:

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* Petitioner's claim that the taking of further evidence would be an "intolerable burden" is without merit. Remands often necessitate a complete retrial of the issues and while this is admittedly "burdensome", it is neither "intolerable" nor unreasonable.

> "If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties, which are designed to secure a trial in the country where the crime was committed, through the extradition of the accused, upon sufficient proof, according to our law, to justify a commitment here."

In re Extradition of Wadge, 15 F. 864, 866 (S.D.N.Y. 1883), cited with approval in *Collins* v. *Loisel,* 259 U.S. 309, 316 (1922) and *Charlton* v. *Kelly,* 229 U.S. 447, 461 (1913).

In 1963, the Second Circuit reiterated this conservative approach holding that "[a]lthough at a hearing of this type, the fugitive has a right to introduce evidence, the right is limited to testimony which explains rather than contradicts the demanding country's proof, and its precise scope is largely in the Commissioner's discretion." *United States ex rel. Petrushansky* v. *Marasco,* 325 F.2d 562, 567 (2d Cir. 1963).

From the cases cited above it is clear that under the traditional extradition standards discovery is limited and

discretionary and under such a standard I would deny the petitioner's broad requests for discovery. If extradition is found to be warranted, petitioner will have amply opportunity in India to defend against the charges.

The petitioner has not, however, based his present request for this additional discovery on the traditional standards applicable in an extradition hearing but instead he argues that the procedural rules and guidelines of federal habeas corpus should be employed in the hearing before Magistrate Goettel.

Petitioner argues that the only issue to be decided is intent which "arises as a disputed issue of fact in a habeas corpus proceeding which tests the jurisdiction of the Court to order extradition, and the trial of that issue must be governed by procedures which obtain in habeas corpus." Affidavit of Edward L. Sadowsky, p. 5, par. 12. There is no case law or statute cited in support of this shift from an extradition hearing standard to a habeas corpus standard and, while the argument may be somewhat novel and interesting, I find no legal basis to support it. The hearing before Magistrate Goettel is an extradition hearing which has been remanded for further development of the intent question. Habeas corpus is merely the method of obtaining a limited review of the extradition hearing since there is no appeal from the extradition hearing itself. *Fernandez* v. *Phillips,* 268 U.S. 311 (1925). Thus, the traditional extradition standards discussed above are controlling and the petitioner's request for further discovery is denied.

So Ordered.

Kevin Thomas Duffy
U. S. D. J.

Dated: New York, New York
January 30, 1974.

Appendix H, Additional Findings on Extradition Proceedings.

UNITED STATES DISTRICT COURT
Southern District of New York

Mag. Dkt. # 72MCA1214

73 Civ. 1630 (Ktd)

In the Matter of the Extradition of

Elijah Ephraim Jhirad

Fugitive from the Justice of the
Government of India

Goettel, *U.S. Magistrate*

Following an extradition hearing requested by the Government of India, I found, in an opinion dated April 12, 1973, that there was probable cause to sustain the charges and, therefore, directed that the respondent*, Elijah Jhirad, be extradited to India. The crime charged by the Government of India was embezzlement of a portion of a Naval Prize Fund as to which Jhirad, then Judge Advocate of the Indian Navy, had been the administrator between 1959 and 1961.

One of the defenses asserted by Jhirad was that the time limit for extraditions authorized by the treaty had expired. Article 5 of the Treaty of 1931 between the United States and India provides that extradition cannot take place if the passage of time has caused an exemption

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* Jhirad is both the respondent in this proceeding and the petitioner in the other proceedings mentioned herein. To avoid confusion, he will be referred to by his name hereafter.

from prosecution under the laws of either party. The United States statute of limitations is five years (18 U.S.C. 3282). (India has no statute and considers delays in prosecution at the conclusion of the case in the overall consideration of guilt or innocence, if prejudice can be shown.) The final incidents of the embezzlement charged occurred in July and September of 1961. The charges against Jhirad were not brought until 1968, some seven years after the last of the offenses charged. However, he had left India on July 26, 1966 and has never returned.

Before the extradition hearing was held, Jhirad had brought on a petition for habeas corpus seeking to bar the extradition proceedings on several grounds, one of which was the statute of limitations defense. The crucial question was whether the simple absence of Jhirad from India tolled the statute of limitations, or whether it was necessary for tolling to prove that he left India to avoid prosecution. In a Memorandum and Order dated January 23, 1973, Judge Duffy ruled that Jhirad tolled the statute by his mere absence from India commencing in July of 1966, and indicated his reluctance to attempt to determine factual issues concerning events which occurred in another country many years ago, particularly when dealing with an embezzlement type offense which can go undiscovered for long periods, thus delaying prosecution and inviting a time bar.

Because of the ruling of Judge Duffy on the first habeas corpus petition, the extradition hearing did not require the presentation of any evidence concerning Jhirad's motives and intent on leaving India although, collaterally, some such evidence was adduced. Following this Court's finding that Jhirad was extraditable, a second writ of habeas corpus was sought from Judge Duffy. Several new objections to extradition were asserted and Jhirad sought to have Judge Duffy reconsider his earlier ruling with

respect to the tolling of the statute of limitations. Judge Duffy, after reviewing the existing law, adhered to his earlier ruling, making the following observations:

> "It is important to remember the context within which this decision must be made. This is an extradition case, involving activity which has taken place half-way around the world. The extradition procedures afforded by statute seek to preserve an element of judicial surveillance over a procedure which is basically an action of international comity. Of necessity, a fugitive is not given a full trial on the issue of his guilt. In fact, the procedures fall strikingly short of a full trial. It would be most difficult for a court in one jurisdiction to seek to determine factual issues arising in another distant jurisdiction. Undoubtedly, this constitutes the rationale for requiring that the demanding country to support extradition merely prove reasonable grounds to believe the fugitive guilty. These same factors persuade this Court that to apply a test requiring a showing of intent, at best a difficult issue of fact, for an act occurring in a distant land, would be most inappropriate."

Jhirad then took consolidated appeals to the Second Circuit from both of the petitions for writs of habeas corpus. In its decision dated October 24, 1973, *Jhirad* v. *Ferrandina,* 486 F. 2d 442 (2d Cir.), the Court of Appeals reversed Judge Duffy in an opinion of first impression in this Circuit, holding that the extraditing government must show an intent to flee from prosecution or arrest in order to toll the statute of limitations. Although asked by both sides to determine on the basis of the evidence in the record whether there was such an intent, the appeals court declined to do so and remanded the case to District Court to make findings on the issue.

Judge Duffy then referred the case to me to make findings and to hold additional hearings if necessary. Jhirad again moved by order to show cause before Judge Duffy to prevent the taking of additional evidence and for other relief. The motion was denied by Judge Duffy in an opinion and order of January 30, 1974. A further hearing was held on January 30, 1974, before the undersigned.

Jhirad argues that a Magistrate has no power to determine this issue since it allegedly relates to jurisdiction. Magistrates are authorized to issue certifications to the Secretary of State after conducting an extradition hearing if "he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty . . ." 18 U.S.C. § 3184. An exemption from prosecution by lapse of time is a matter of defense to be considered at trial *unless* specified in the treaty as a continegency for declining extradition. *Hatfield* v. *Guay,* 87 F.2d 358 (1st Cir. 1937). Article 5 of the extradition treaty states that "the extradition shall not take place if . . . exemption from prosecution or judgment has been acquired by lapse of time, according to the laws of [either country]." Consequently, it would appear that whether prosecution of an offense is time barred is a matter to be determined under the treaty and is properly considered by the Magistratee at the extradition hearing. Moreover, this issue was before Judge Duffy in the motion denied on January 30, 1974, foreclosing further consideration here. In any event, Jhirad has not been reluctant about filing petitions for habeas corpus, and it can be assumed that, if he is unsatisfied with this opinion, he will file still another, thereby getting the District Court's adjudication that he seeks.

Jhirad objected to the evidence offered by the Government of India at the hearing on the grounds that it was not properly authenticated under the provisions of 18

U.S.C. 3190. At the hearing the evidence offered was under consular seal, but the supporting certificate was not the type which authenticated documents "so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped" 18 U.S.C. § 3190. Consequently, the hearing was held open to enable India to introduce the evidence with proper authentications. India's counsel submitted additional copies of the documents with certificates in the proper form. However, Jhirad now objects that the authentications were improper because they were not executed by "the principal diplomatic or consular officer of the United States resident in such foreign country", as also required by 18 U.S.C. § 3190.

The certificates first submitted bore the signature of the ambassador or consul of the United States. The supplemental corrected certificates (15 in number) are all but one signed by the "Charge d'Affaires, ad interim". (One certificate was executed by United States Ambassador Moynihan.) Jhirad argues that the Court can take judicial notice of the fact that Ambassador Moynihan is the principal American diplomatic official in India, that he is in residence there, and, consequently, the Charge d'Affaires was not authorized to execute the certificates. The defect in this argument is that Ambassadors are not continually in residence in the country to which they are assigned and often return to their native country or travel abroad. The 14 certificates authenticated by the Charge d'Affaires are all dated February 13, 1974. The one signed by Ambassador Moynihan is dated February 23, 1974. This, and the "ad interim" designation of the Charge d'Affaires, suggests that the Ambassador was not "in residence" on the thirteenth of February and that the signer was the principal diplomatic or consular officer on the date in question. *In Re Herres,* 33 F. 165 (8th Cir. 1887); *In Re Orpen,* 86

F. 760 (9th Cir. 1898). In the absence of other proof, the assumption of regularity of official acts is sufficient to support the admissibility of the documents. *Wong Wing Foo* v. *McGrath,* 196 F.2d 120 (9th Cir. 1952).

Another argument made by Jhirad is that the documents should not be admissible since this hearing concerns a jurisdictional question and should be governed by the standards set down in 28 U.S.C. 2246 for a habeas corpus proceeding. This is essentially the same argument as that concerning the jurisdiction of the Magistrate which was rejected above.

We turn now to the issue of the intention of Jhirad in leaving India, as directed by the Court of Appeals. It appears that the appellate court was not cognizant of all the facts involving Jhirad's departure from India since its opinion merely recites, "In July of 1966 the appellant left India, residing first in Switzerland, then in Israel, and finally arriving in the United States where he was granted a permanent resident visa". The complete chronology of the event is as follows:

February 19, 1966—The Central Bureau of Investigation in India was requested to commence an investigation concerning allegations that there had been mismanagement, and possibly embezzlement, from the Naval Prize Fund.

May, 1966—Jhirad informed a naval officer who had been directed to conduct an inquiry that the records of the Prize Fund had been destroyed (Jhirad had informed his superiors of this fact in the later part of 1965).*

May 26, 1966—A subpoena duces tecum was issued to the Central Bank of India where the Naval Prize Fund had

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* Jhirad denied that these events occurred.

been maintained and where Jhirad had a personal account.**

June, 1966—An employee of the Central Bank of India advised Jhirad that the subpoena had been received.*

June 17, 1966—The Secretary General of the World Jewish Congress invited Jhirad to attend the Fifth Plenary Assembly in Brussels, July 31 to August 9, 1966. Subsequently, after being designated by the Central Jewish Board of Bombay as one of the representatives of Indian Jewry, the Congress agreed to defray his costs. (A week later his wife was invited to an auxiliary conference of Women's Zionist Organization held at the same time and place.)

June 28 to July 16, 1966—Jhirad and his wife sold various of his law books and other items of his personal possessions.

July 2, 1966—The case was officially registered with the Central Bureau of Investigation.

July 3, 1966—Jhirad obtained his passport.

July 5, 1966—The police began their investigation.

July 16 to July 22, 1966—Jhirad obtained visas to visit Belgium, France and Switzerland.

July 19, 1966—Jhirad obtained permission from his naval superiors to go to Brussels to attend the World Jewish Congress meeting.

** The subpoena was issued under a criminal file number of an earlier and apparently dormant investigation concerning Jhirad's misuse of his business telephone and his having made extensive speculative investments.

July 26, 1966—Jhirad left India with his wife and children to attend the World Jewish Congress meeting. (He stopped en route for a few days in Switzerland.)

July 30 - August 10, 1966—Jhirad and his wife and family were in Brussels attending the World Jewish Conference.

August 10, 1966—Jhirad and his family traveled to Geneva and resided there openly until 1967, when they emigrated to Israel.

Jhirad maintains that he left India for the sole purpose of attending the World Jewish Conference in Brussels, which he had attended a number of times in the preceding years, and taking a vacation thereafter in Switzerland. He contends that he was unaware of the existence of the investigation and that he did not make a final determination not to return to India until November or December of 1966. He points out that, although he did withdraw some of his funds from banks in India and did sell certain of his possessions, he left behind much of his furniture and other possessions, as well as $10,000 in one bank account. He claims that his decision not to return to India was made not because he feared prosecution but because of a hostile attitude toward him which he believed he had observed in the Indian Government. Indeed, it is Jhirad's contention that he was unaware of the criminal prosecution until he was arrested in this country in 1972.

We are not, of coursce, compelled to accept Jhirad's explanation for his actions. To determine his intention in leaving India we must consider all of the evidence. Jhirad argues, however, that the Government of India, in order to toll the limitations period, is required to prove that he

left India with intent to avoid prosecution *beyond a reasonable doubt.* This argument is based upon the fact that, although a finding of probable cause is all that is necessary in order to find grounds for extraditing Jhirad, the question of whether extradition is time barred under the treaty is an issue for determination only in this Court and, therefore, subject to the burden of proof of a criminal prosecution. Admittedly, this is not an issue which will be ultimately considered in India (except to the extent that, if prejudice can be shown, it may be considered in evaluating guilt). Moreover, if this were a domestic prosecution the burden would be on the government to establish beyond a reasonable doubt that the statute of limitations was tolled. *People* v. *Kohut,* 30 N.Y.2d 183, 331 N.Y.S.2d 416, 282 N.E.2d 312 (1972).

While this argument is interesting and has a superficial attraction, no authority has been cited to support it. If, in fact, India must prove, beyond a reasonable doubt, flight to avoid prosecution before the expiration of the period of limitations, then it is clear that India has failed in that regard. However, because of the considerations cited in Judge Duffy's opinion quoted above, I do not accept that as being the applicable standard, and I pass on to a finding of the facts on the basis of the preponderance of the evidence.

On all the evidence, I conclude that Jhirad left India for the primary and immediate purpose of attending a World Jewish Conference in Brussels. However, I find that he was aware of the pending investigation, was concerned about it, and considered the possibility that he would not return to India even before he left for Brussels. The trip to Brussels, followed by the vacation in Switzerland, was an opportune time for Jhirad to leave India without creating any undue suspicion, to reappraise his situation when out of India without immediately commit-

ting himself to a course of action, and to defer making a decision on returning to India until necessary.*

It can be argued that, since he did not leave India for the immediate purpose of avoiding prosecution, the statute of limitations was never tolled. This appears to be too simplistic an approach. If he did not return to India, when he otherwise would have, so as to avoid prosecution, that would be a constructive flight. The problem is in determining when that occurred.

Although Jhirad contends that he did not make his decision not to return until November or December of 1966 (and then for different reasons), it appears likely that the decision was made somewhat earlier. Jhirad was in the active practice of law in India when he left. He had his cases adjourned until after the middle of October (according to his testimony). He sold one of his air conditioners to an acquaintance, since he was going to be away during the hot summer months. Previously when he had taken vacations following his trips to World Jewish Conferences, he had stayed only a week to a month. I conclude, therefore, that when he stayed on in Geneva into the fall of 1966, he had made his decision not to return to resume his law practice. Unfortunately, the exact time is extremely critical. The time for prosecution of the last two offenses would have expired in the latter part of September (September 25 and September 27).

Of course, it can be argued that the exact date of decision is not important; that if, while away from his home land, he forms an intention not to return to avoid prosecution the constructive flight can be said to have commenced when he first left. However, no authority has been cited,

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*Neither party offered any evidence whatever as to when, and for what periods, Jhirad had made living arrangements in Switzerland.

nor has any been uncovered by independent research, indicating that this is an acceptable concept. (For that matter, no cases have been uncovered dealing with a situation even remotely resembling this.) Indeed, to apply the requirements of the Second Circuit's opinion to the facts of this case indicates the validity of Judge Duffy's doubts that this is a matter appropriate for determination by this Court at this time. However, we are left with no alternative but to make a finding with respect to Jhirad's intent.

I find it more likely than not, although he did not leave India to avoid prosecution, while away he decided not to return to India, since he feared being prosecuted. Although it is a difficult determination, I find this decision was made in the middle of September, 1966, and before the 25th and 27th days of that month. Consequently, I am again prepared to certify to the Secretary of State the findings, evidence, exhibits, and transcripts in this matter for appropriate action in extraditing Jhirad to India. However, since it is clear that Jhirad will again seek a writ of habeas corpus, and since there are admittedly very difficult questions involved in this opinion, the remanding of Jhirad to the custody of the Attorney General will be stayed for a period of ten days to allow him to petition for a writ of habeas corpus.

So Ordered:

Gerard L. Goettel
United States Magistrate

Dated: New York, N.Y.
April 26, 1974

Appendix I, Opinion and Order.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1630

ELIJAH EPHRAIM JHIRAD,

Petitioner,

—against—

THOMAS E. FERRANDINA, United States Marshal,
Southern District of New York,

Respondent.

APPEARANCES:

TENZER, GREENBLATT, FALLON & KAPLAN, ESQS.
Attorneys for Petitioner

By: Edward L. Sadowsky, Esq.
Of Counsel

LOUIS STEINBERG, ESQ.
EDWIN A. STEINBERG, ESQ.
Attorneys for the Government of India

HONORABLE PAUL J. CURRAN
United States Attorney
Attorney for Respondent

By: William R. Bronner, Esq.
Assistant United States Attorney
Of Counsel

KEVIN THOMAS DUFFY, D.J.

This is the third petition for a writ of habeas corpus brought in this international extradition proceeding. See

355 F. Supp. 1155 (S.D.N.Y. 1973) & 362-F. Supp. 1057 (S.D.N.Y. 1973), rev'd & remanded, 486 F.2d 442 (2d Cir. 1973). The remand from the Court of Appeals was occasioned by a different definition of the term "fleeing from justice" than that applied by me, there being a conflict among the circuits on this point. See *Donnell* v. *United States,* 229 F.2d 560 (5th Cir. 1956); *Brouse* v. *United States,* 68 F.2d 294 (1st Cir. 1933) but see *King* v. *United States,* 144 F.2d 729 (8th Cir.), *cert. denied,* 324 U.S. 854 (1944); *McGowen* v. *United States,* 105 F.2d 791 (D.C. Cir.), *cert. denied,* 308 U.S. 552 (1939).

Petitioner in this habeas corpus proceeding, Elijah Ephraim Jhirad, was Judge Advocate General of the Indian Navy. As such, between 1959 and 1961, he was in charge of a prize fund established for the benefit of certain Indian sailors who had served during World War II.

It is alleged by the Government of India that a substantial portion of the prize fund was embezzled by Jhirad. It is clear that the petitioner left India on July 26, 1966, and that the applicable five year statute of limitations, unless tolled, would have expired on September 27, 1966. The only question presented on the remand by the Court of Appeals is whether Jhirad left India with the "intent to flee from justice," which would toll the statute of limitations.

Magistrate Goettel held further hearings on the remand and filed "Additional Findings on Extradition Proceedings" in which he set forth (as best he could) the complete chronology of the events whereby Jhirad formed an "intent to flee" the jurisdiction of India.

February 19, 1966: The Central Bureau of Investigation in India was requested to commence an investigation concerning allegations that there had been mismanagement, and possibly embezzlement, from the Naval Prize Fund.

May, 1966: Jhirad informed a naval officer who had been directed to conduct an inquiry that the records of the

Prize Fund had been destroyed (Jhirad had informed his superiors of this fact in the later part of 1965).*

May 26, 1966: A subpoena duces tecum was issued to the Central Bank of India where the Naval Prize Fund had been maintained and where Jhirad had a personal account.**

June, 1966: An employee of the Central Bank of India advised Jhirad that the subpoena had been received.*

June 17, 1966: The Secretary General of the World Jewish Congress invited Jhirad to attend the Fifth Plenary Assembly in Brussels, July 31 to August 9, 1966. Subsequently, after being designated by the Central Jewish Board of Bombay as one of the representatives of Indian Jewry, the Congress agreed to defray his costs. (A week later his wife was invited to an auxiliary conference of Women's Zionist Organization held at the same time and place.)

June 28 to July 16, 1966: Jhirad and his wife sold various of his law books and other items of his personal possessions.

July 2, 1966: The case was officially registered with the Central Bureau of Investigation.

July 3, 1966: Jhirad obtained his passport.

July 5, 1966: The police began their investigation.

July 16 to July 22, 1966: Jhirad obtained visas to visit Belgium, France and Switzerland.

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* Jhirad denied that these events occurred.

** The subpoena was issued under a criminal file number of an earlier and apparently dormant investigation concerning Jhirad's misuse of his business telephone and his having made extensive speculative investments.

July 26, 1966: Jhirad left India with his wife and children to attend the World Jewish Congress meeting. (He stopped en route for a few days in Switzerland.)

July 30-August 10, 1966: Jhirad and his wife and family were in Brussels attending the World Jewish Conference.

August 10, 1966: Jhirad and his family traveled to Geneva and resided there openly until 1967, when they emigrated to Israel.

Jhirad argues that he left India solely for the purpose of attending the World Jewish Conference and that he did not form the intention not to return to India until November or December of 1966. These dates are extremely important since the applicable statute of limitations would have time barred the extradition on September 25 or 27, 1966. Magistrate Goettel found, however, that while the "intent to flee" might not have existed at the time Jhirad left India on July 26, 1966, it certainly was formed by the early part or, at the latest by the midpoint, of September 1966, and thus that extradition was not time barred.

I have reviewed the entire record in this case: the exhibits, the transcripts, the affidavits and all other pertinent documents. I must conclude that the Magistrate's finding that Jhirad should be extradited was correct and that this petition for habeas corpus must be denied.

Had I been the trier of the facts I would perhaps have determined that the "intent to flee" to avoid prosecution was formed even prior to the time Jhirad left India. There is substantial evidence in the record to indicate that Jhirad knew that he was under investigation prior to that date.

I have spent an enormous amount of time in reviewing and re-reviewing the extensive record in this case. It shows that Jhirad in the latter part of 1965, admitted to his superiors in the Indian Navy that all the records of the prize fund had been destroyed; that the matter was referred by the Navy to the Special Police Establishment pursuant to a confidential memorandum to the Ministry

of Defense; that in February 1966, the Central Bureau of Investigation commenced an inquiry to determine the whereabouts of the records; that on May 26, 1966, a subpoena duces tecum concerning these records was issued to and received by the Central Bank of India where the Prize Fund account was kept; that in June 1966, an employee of that bank informed Jhirad of the investigation and of the fact that the subpoena had been received.

At the time of these latter incidents, the petitioner was engaged in his own private law practice which apparently was somewhat successful. Between June 28, 1966 and July 16, 1966, petitioner and his wife disposed of various articles of personal property including law books and an air conditioner. All of his cases were adjourned to October and were left in the control of a junior associate, who was told that he could retain the fees in the matters.

On the other hand, the petitioner supposedly left India leaving behind a good portion of his furnishings and leaving his sister in charge of a bank account worth $10,000.

I have concluded, therefore, that Magistrate Goettel would be well within the evidence had he concluded that Jhirad had formed the necessary intent to flee prosecution at the time he left India on July 26, 1966. But it is not my province to try the matter *de novo;* it is sufficient for me to determine whether the conclusions of the Magistrate are supported by the evidence. In this it must be said that it is clear that the Magistrate was most fair. There is some evidence in the record that prior to 1966, when Jhirad took his family on trips to Europe, they would often take a vacation in Switzerland. The longest these vacations lasted was a month but generally they were restricted to one week. It would seem that the Magistrate theorized that the intent to flee matured when the supposed "vacation" in Switzerland exceeded by 150 per cent the longest prior vacation; and when combined with the facts set out above that the preponderance of the evidence would point to a solidified intent to flee to avoid prosecu-

tion. Certainly such "a striking change in [petitioner's] habits as to his customary places of resort" is a relevant consideration under *Brouse* v. *United States,* 68 F.2d 294, 296 (1st Cir. 1933).

I find that the Magistrate's finding and conclusion on the issue of intent is well-documented in the record and I will not overturn it.

The petitioner argues, however, that for there to be a tolling of the statute of limitations it is imperative that the petitioner have actually left India with the intent to flee prosecution and that intent had to have been fully matured at the time of leaving. I hold otherwise. To fully ascertain the question of intent one must examine the operation of another man's mind which is always a difficult problem for a finder of fact. Often judges are called upon to make this determination by evidence as to what happens after the crucial time. This is all that happened in this particular case. And rather than relate back the evidence concerning the maturation of intent the Magistrate gave petitioner every advantage in his construction of the evidence.

In any event, even if a defendant learns of potential prosecution while he is without a state and for that reason alone chooses not to return to his normal state, there may be a question of flight from justice. The question has been resolved against the petitioner and the evidence fully supports that ruling.

The petitioner also argues, without citation to any authority, that the burden of proof which the Government of India must bear to show that Jhirad was a fugitive from justice in the extradition proceeding must be that required in an ordinary criminal case in this country, i.e., that each element must be proved beyond a reasonable doubt. The petitioner claims that the Government of India did not establish "intent to flee" beyond a reasonable doubt and Magistrate Goettel has so found. Additional Findings, p. 12.

The treaty under which India seeks to extradite petitioner provides that "the extradition shall not take place if . . . exemption from prosecution or judgment has been acquired by lapse of time, according to the laws of [either country]." Petitioner argues that this provision requires that in determining whether the statute of limitations was tolled I must apply the traditional standard used in criminal cases, i.e., beyond a reasonable doubt. I find no support for petitioner's position in either the language of the treaty or the case law on this subject.

As I stated in an earlier opinion in this case: "It is important to remember the context within which this decision must be made. This is an extradition case, involving activity which has taken place halfway around the world. The extradition procedures afforded by statute seek to preserve an element of judicial surveillance over a procedure which is basically an action of international comity. . . . In fact, the procedures fall strikingly short of a full trial." 362 F. Supp. 1060. The Magistrate correctly rejected the petitioner's reasonable doubt argument.

The petitioner puts forth two additional arguments: one, that the Megistrate had no power to make findings on the issue of the remand, and two, the evidence relied upon was incompetent and inadmissible because it denied him the opportunity to confront and cross-examine the witnesses against him. I find that in the context of an extradition proceeding both of these arguments are without merit and that the procedures followed by the Magistrate were correct.

The petition for a writ of habeas corpus is denied.

So Ordered.

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U.S.D.J.

Dated: New York, New York
July 17, 1975.

Appendix J, Order of Affirmance.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 568 September Term, 1975

(Argued: February 9, 1976 Decided: April 12, 1976

Docket No. 75-2102

Elijah Ephraim Jhirad,

Petitioner-Appellant,

v.

Thomas E. Ferrandina,
United States Marshal,
Southern District of New York,

Respondent-Appellee.

Before: Lumbard and Timbers, Circuit Judges, and Bryan,* District Judge.

Appeal from an order of the Southern District, Duffy, J., 401 F.Supp. 1215, denying appellant's third petition for habeas corpus relief in this international extradition proceeding.

Affirmed.

Edward L. Sadowsky, Esq., New York, New York (Tenzer, Greenblatt, Fallon & Kaplon, on the brief), for

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* Sitting by designation.

Petitioner-Appellant.
EDWIN A. STEINBERG, Esq.,
New York, New York,
for government of India, Real
Party in Interest.

LUMBARD, Circuit Judge:

Elijah Ephraim Jhirad appeals from an order of the Southern District entered July 17, 1975, denying his third request for habeas corpus relief in this protracted international extradition proceeding. The Government of India seeks Jhirad's return for prosecution on charges of embezzlement from a Naval Prize Fund which he, as former Judge Advocate General of the Indian Navy, was responsible for administering. In an earlier opinion in this case, 486 F.2d 442 (2d Cir. 1973), (Jhirad I), we ruled that 49 of the 52 counts listed in India's functional equivalent of our indictment were time barred, but remanded for a finding as to whether appellant had left India with intent to avoid prosecution thus tolling the statute of limitations with respect to the final three incidents.

Jhirad now challenges Magistrate Goettel's determination, approved by Judge Duffy, that appellant's "constructive flight" in not returning to his homeland when he otherwise would have but for fear of the pending criminal investigation was sufficient to satisfy the tolling requirements of 18 U.S.C. § 3290.[1] Jhirad contends that this conclusion exceeded our mandate on remand and thereby violated the law of the case, that it followed a hearing at which appellant was denied discovery to which he was entitled, that it was in any event unsupported by the evidence adduced and that it was based on an erroneous interpretation of 18 U.S.C. § 3290. We affirm, finding no merit in any of these contentions.

The facts underlying Jhirad's indictment are fully set forth in the prior decisions of this court, the district court

and the magistrate, and will therefore be only briefly summarized here. In late 1958, while appellant was serving as Judge Advocate General of the Indian Navy,[2] Great Britain transferred to the Indian Navy 1,973,679 rupees[3] for distribution as a prize fund to those Indians who had seen at least 180 days of active sea duty during World War II. Jhirad, appointed administrator of the fund along with two others, was personally responsible for the distribution of approved claims. He was accordingly authorized to withdraw monies from the bank account established for the fund with the counter signature of P. L. Sharma, secretary to the fund. Between February 1959 and September 1961 virtually the entire allotted sum was disbursed.

In November 1965, Naval Headquarters in New Delhi received a complaint from an ex-sailor that prize fund money due him had never been paid.[4] Admiral Nair, Chief of Personnel, contacted Jhirad to have him check into the matter. When appellant indicated that he could not produce a list of payees since no audit of the fund had ever been conducted and all records pertaining to the fund had been destroyed pursuant to his instructions, Nair alerted his superiors who in turn notified the Special Police Establishment. An investigation was then begun during the course of which Nair again spoke to Jhirad in June 1966, asked him to turn over all relevant documents and was told that none existed. At approximately the same time, appellant was informed that a suboena duces tecum had been issued to the Central Bank of India, at which both the prize fund account and his personal account were maintained.

On June 17, 1966, the Secretary-General of the World Jewish Congress invited Jhirad to attend an international conference in Brussels during the early part of August. Appellant, who had long been an outspoken advocate of Zionism and Jewish causes, had in the past attended sim-

ilar meetings, the last one being in 1961. Prior to his departure on July 26, 1966, appellant and his wife sold various of his law books along with other of their personal possessions. Jhirad, moreover, adjourned all cases pending in his private law practice until October. In addition, the entire family obtained passports and procured visas for Belgium, France and Switzerland. Meanwhile, the inquiry into Jhirad's conduct was officially registered with the Central Bureau of Investigation on July 2, 1966.

After a brief stopover in Switzerland, Jhirad attended the conference in Brussels from July 30 to August 10, 1966. From there, he travelled to Geneva where he lived openly until the summer of 1967, when he emigrated with his family to Israel. In June 1971, appellant came to the United States. One year later, he was arrested and held for extradition on the above noted charges.

On the basis of the foregoing evidence, Magistrate Goettel concluded that while Jhirad "left India for the primary purpose of attending the World Jewish Congress in Brussels," he was already aware of the pending investigation, considered the possibility that he would never return and perceived his trip as an opportunity to contemplate his future away from the immediate pressures of New Delhi. The magistrate further found that appellant's decision to expatriate crystallized sometime in early September 1966, thus tolling the five year statute of limitations with respect to the final two alleged acts of embezzlement on September 25 and 27, 1966. That calculation was premised upon the fact that Jhirad's journeys to conferences abroad in four previous years, even when coupled with his annual vacation, never exceeded one month. Magistrate Goettel reasoned, upon the basis of appellant's past practices, that by the time Jhirad had been gone for a month and a half, he must already have decided not to return. Judge Duffy agreed, adding that

had he been the factfinder he "would perhaps have determined that the 'intent to flee' to avoid prosecution was formed even prior to the time Jhirad left India." This appeal followed.

Orders of extradition are *sui generis*. They embody no judgment on the guilt or innocence of the accused but serve only to insure that his culpability will be determined in another and, in this instance, a foreign forum. They may, moreover, be issued by any state judge, federal judge or, as here, a magistrate acting upon the direction of a district court, 18 U.S.C. § 3184. Extradition orders do not, therefore, constitute "final decisions of a district court," appealable as of right under 28 U.S.C. § 1291. Jiminez v. Aristeguieta, 290 F.2d 106 (5th Cir. 1961). Rather, if review is to be had at all it must be pursued by a writ of habeas corpus. See Shapiro v. Ferrandina, 478 F.2d 94 (2d Cir. 1973). This procedural idiosyncracy has important substantive consequences. The rule has long been accepted that a habeas judge can only "inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." Fernandez v. Phillips, 268 U.S. 311, 312 (1925). See also, Benson v. McMahon, 127 U.S. 457, 463 (1888).

Accepting, as he must, this limited scope of review, Jhirad nevertheless argues that the evidence introduced at the hearing below was insufficient to "block out those elements" which would be essential for conviction were he tried for the analogous crime of embezzlement in the courts of New York State.[5] Collins v. Loisel, 259 U.S. 309, 317 (1922). We do not agree. The Government of India has amply established that appellant was administrator of the Naval Prize Fund with joint authority to withdraw monies

therefrom, that he did on numerous occasions withdraw such monies and that shortly following many of those withdrawals, he deposited closely equivalent sums in his personal bank account.[6] Jhirad concedes this much. He insists, however, that to make out a prima facie case of embezzlement, India must additionally show that some bona fide claimant was denied his rightful share in the fund.

This is simply not the law in New York or elsewhere. Embezzlement, now subsumed under the general category of larceny, is defined in New York Penal Code § 155.05 as the wrongful taking of "property from an owner thereof." Jhirad asserts that he could not have embezzled money from the Indian government since the Indian Navy had no reversionary interest in the fund which, by its terms, was to be distributed in its entirety among the eligible claimants according to a pre-set formula. Appellant omits to note the equally obvious point that he similarly had no title to the earmarked fund. Any money which he nonetheless diverted to his personal use was, as a result, unavailable to those to whom it properly should have gone. No more need be shown. See State v. Nelson, 362 Mo. 129, 240 S.W.2d 140, 142 (Sup. Ct. 1951).

The question of Jhirad's "constructive flight" from India is a more troublesome one. At the outset, we must confront appellant's challenge to the magistrate's ruling as beyond the scope of our earlier mandate. In Jhirad I, we decided as a matter of first impression in this circuit, that the tolling provision of 18 U.S.C. § 3290 is available only if "an intent to flee from prosecution or arrest" is shown. 486 F.2d at 444. Since the district court had proceeded on the mistaken assumption that Jhirad's mere absence from India was sufficient to halt the running of the statute of limitations, we remanded for "findings on the issue of intent." Judge Duffy, in turn, referred the matter to Magistrate Goettel.

Reading the above-quoted language in its most literal sense, appellant contends that the magistrate overstepped the bounds of his delegated duty and violated the law of the case by inquiring into Jhirad's motivation in not returning to his homeland. An examination of the opinion as a whole, however, plainly reveals that our concern then, as it is now, was with the reason for Jhirad's *absence* from India. Indeed, we specifically and approvingly cited Donnell v. United States, 229 F.2d 560, 565 (5th Cir. 1956), for the proposition that "those persons shall be denied the benefit of the statute of limitations who have absented themselves from the jurisdiction of the crime with the intent of escaping prosecution." 486 F.2d at 444.

We are convinced that the notion of "constructive flight" developed by the magistrate, although concededly without precedent, is fully supported by both the language and the logic of 18 U.S.C. § 3290.[7] We cannot agree with Jhirad that a meaningful distinction exists between those who leave their native country and those who, already outside, decline to return. In Streep v. United States, 160 U.S. 128, 135 (1895), the Supreme Court rejected just such a formalistic approach. The Court there held that it was unnecessary to prove that the defendant had fled the jurisdiction of a particular court, state or federal, if it could be established that his movements were prompted by a desire to avoid and thwart the orderly workings of the judicial process. We believe that principle to be applicable here.

We note, moreover, that even were we to agree with appellant that our opinion in Jhirad I neither anticipated nor justified the magistrate's determination of "constructive flight," the law of the case doctrine is only discretionary in this circuit and we are therefore free, as an appellate court, to revise our earlier ruling in the light of new evidence presented at the subsequent hearing. See United States v. Fernandez, 506 F.2d 1200, 1203 (2d Cir. 1974).

Jhirad's argument that there was no evidentiary basis for the magistrate's finding of "constructive flight" is without merit. India introduced sworn statements from three individuals who claim to have alerted appellant to the pending criminal investigation prior to his departure for Brussels in July 1966[8] as well as the affidavit of a New Delhi book dealer who, during the same period, purchased a substantial portion of Jhirad's law library. Other personal effects were also sold. We agree with Judge Duffy, 401 F. Supp. 1215, 1218 (SDNY 1975), that these indicia strongly suggest that, despite appellant's disclaimer, his intent in leaving India was to avoid prosecution. Cf. Brouse v. United States, 68 F.2d 294, 296 (1st Cir. 1933). Jhirad's emphasis upon his testimony that he left behind some home furnishings and $10,000 seems to us at best ambiguous and self-serving since he said that he left the money with his sister.

We are not, however, prepared to say that Magistrate Goettel was clearly erroneous in his determination that Jhirad's primary purpose in travelling to Belgium during the summer of 1966 was to attend the World Jewish Conference, or that Judge Duffy erred in accepting this finding. But, insofar as we feel that a contrary ruling would have been clearly supported and was perhaps even indicated, we see no reason to disturb the less drastic finding that Jhirad formed a definite intent not to return to India in early September of that same year, by which time he had already been out of the country for a longer period than on any of his previous similar trips.

Jhirad contends that the evidence summarized above presents a distorted picture which he was powerless to remedy since Judge Duffy denied his request for discovery. Jhirad v. Ferrandina, Dkt. No. 73 Civ. 1630 (S.D.N.Y. Jan. 30, 1974). Appellant does not dispute the well-entrenched rule that extradition proceedings are not to be

converted into a dress rehearsal trial. See Charlton v. Kelly, 229 U.S. 447 (1913). Rather, he stresses that the hearing below occurred on remand from a habeas appeal and that he was therefore entitled to all the procedural protections afforded by 28 U.S.C. § 2246. See also, Harris v. Nelson, 394 U.S. 286, *reh. den.* 394 U.S. 1025 (1969).

The decision in *Harris* upon which appellant so heavily relies merely points out that the district judge has the right to authorize such discovery procedures "as law and justice require," 28 U.S.C. § 2243. It plainly does not compel their availability no matter what the circumstances. The procedural posture of this particular case does not affect its basic nature or purposes. It is still appellant's extradition which is being sought.

Here, the sole issue being contested was Jhirad's intent in absenting himself from India in August and September 1966. This is a question peculiarly within the capacity of the appellant to answer. Its resolution would not have been appreciably advanced by allowing him to inspect, *inter alia,* his entire Navy personnel file as he asked to do. Nor has Jhirad demonstrated any prejudice flowing from Judge Duffy's ruling. Cf. U.S. ex rel. Petrushansky v. Marasco, 325 F.2d 562 (2d Cir. 1963), cert. denied 376 U.S. 952 (1964), reh. denied, 377 U.S. 920 (1964). Under the facts here presented, we hold that Judge Duffy properly exercised his discretion in denying discovery.

Jhirad next urges that India was obligated to prove beyond a reasonable doubt both the motivation and timing of his decision not to return to his homeland. We agree with the magistrate and district court, however, that the applicable standard on this issue is only preponderance of the evidence and that, for the reasons already noted, India's proof fully satisfied this less exacting test.

Jhirad argues that the reference in Article 5 of the extradition treaty to the five year statute of limitations of 18 U.S.C. § 3290 compels the conclusion that the drafters

similarly intended to incorporate the burden of proof in a domestic criminal prosecution, whereby the state would have to show beyond a reasonable doubt that the relevant statute of limitations had not expired. People v. Kohut, 331 N.Y.S.2d 416, 419 (Ct. App. 1972).

It is of course axiomatic that the reasonable doubt standard lies at the foundation of our notions of due process in criminal cases. In re Winship, 397 U.S. 358, 363 (1970). As enunciated by the Supreme Court in *Winship,* it advances the important societal goals of minimizing the risk of erroneous convictions and promoting public confidence in our judicial system. See also Mullaney v. Wilbur, 421 U.S. 684 (1975). Plainly, however, these interests apply with less force in the context of an international extradition proceeding. It is well to remember that Jhirad's ultimate culpability will not be determined in the United States. It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity upon which extradition is based. Factor v. Laubenheimer, 290 U.S. 276 (1933).

On the other hand, we believe it is fair that India be required to show by a preponderance of the evidence that the statute of limitations has been tolled by Jhirad's conduct. Unlike the elements of the offense, for which only probable cause need be established, Collins v. Loisel, supra, the question of whether Jhirad's prosecution is time barred will not again be reviewed in India.[9]

Appellant's final claim is that his extradition is politically motivated and thus barred by the terms of the treaty. Article 6 thereof provides as follows:

> A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

Jhirad maintains that his impending prosecution, and the diligence with which India has through the years sought his return, may be best explained by India's desire to punish him for his outspoken advocacy of Israeli causes at a time when India's national policy favored the Arab bloc. He asserts that he was warned about his activities while still in India and placed under police surveillance. The record is clear, however, that throughout those same years, Jhirad held the highest civilian office in the Indian Navy, was allowed to travel abroad freely and was honored with the designation of Senior Advocate by the Indian Bar Association.

Whatever weight may properly be given to any such claims, it is surely beyond dispute that the embezzlement of money from a Naval Purse Fund, which Jhirad as a public servant was responsible for administering, is not in any sense a political offense. The record shows enough to indicate that India was not without a substantial basis for prosecuting Jhirad for his failure to account for funds entrusted to his control. Cf. In re Gonzalez, 217 F. Supp. 717, 722 (S.D.N.Y. 1963).

Affirmed.

FOOTNOTES

[1] 18 U.S.C. § 3290 reads as follows: "No statute of limitations shall extend to any person fleeing from justice." Its tolling provision applies to this case, along with the basic five year federal statute of limitations, 18 U.S.C. § 3282, pursuant to Article 5 of the extradition treaty, 47 Stat. 2122, which gives the accused the benefit of the shorter period available in either the requesting country or the asylum country. India has no statute of limitations, although the amount of time elapsed since the commission of the crime may be considered by the court at the close of the case in determining whether the defense has been unduly prejudiced by the passage of years. See Assistant Customs Collection—Bombay v. Melwani, 2 S.C.R. 438 (1968).

Appendix J, Order of Affirmance.

[2] The post of Judge Advocate General is the highest civilian post in the Indian Navy.

[3] This amounted to slightly over $400,000 at the then current exchange rate.

[4] As Magistrate Goettel pointed out, there is no evidence that this individual, or any other, failed to receive his money after filing a *proper* claim.

[5] Appellant was actually charged with the crime of Breach of Trust of a Public Servant, Indian Penal Code § 409. As defined in § 405, a criminal breach of trust occurs whenever one, "being entrusted with property . . . dishonestly misappropriates or converts to his own use that property in violation of any direction of law . . ."

There was expert testimony below that the elements of criminal breach of trust in India are identical to those required to prove embezzlement in the United States. Tr. 121-22. Throughout this litigation, both parties have argued on that basis.

[6] For example, on September 29, 1961, Jhirad withdrew the sum of 30,000 rupees from the Naval Prize Fund. The following day, he deposited 14,000 rupees in cash in his personal account. On September 27, 1961, Jhirad withdrew 10,000 rupees from the fund and that same day, deposited 5,000 rupees in his personal account.

[7] See note 1, supra.

[8] In addition to the conversations with Admiral Nair and the bank employee, previously noted, Commander Swamy of the Indian Navy also claims to have spoken to Jhirad in May 1966 about the destruction of the prize fund records. Appellant denies all three of these alleged talks.

[9] See note 1, supra.

As a corollary to his claim that the statute of limitations has run, Jhirad also contends that he was irremediably prejudiced by Judge Duffy's fourteen-month delay in deciding this third and latest petition for habeas corpus. When judged against the thirteen years which had already elapsed since the alleged commission of the crime, we cannot agree that this additional period of waiting so hampered appellant's ability to prepare his defense as to warrant the grant of the writ. We note, moreover, that the Sixth Amendment's guarantee to a speedy trial, limited by its terms to criminal prosecutions, is inapplicable to international extradition proceedings. Cf. Middendorf v. Henry, 44 U.S.L.W. § 4401 (U.S. March 24, 1976).

Appendix K, Order Granting Stay.

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 30th day of April, one thousand nine hundred and seventy-six.

Elijah Ephraim Jhirad,

Petitioner,

v.

Thomas E. Ferrandina, United States Marshal, Southern District of New York,

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated April 23, 1976 to stay issuance of the mandate pending determination of the petition for a writ of certiorari to the Supreme Court of the United States pursuant to Rule 41(b) of the Federal Rule of Appellate Procedure in the event that the petition for rehearing with suggestion for rehearing *en banc* is denied be and it hereby is granted.

GRANTED

J. EDWARD LUMBARD
WM. H. TIMBERS (WFH)
FREDERICK VP. BRYAN
Circuit Judges

Appendix L, Order Denying Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of May, one thousand nine hundred and seventy-six.

75-2102

ELIJAH EPHRAIM JHIRAD,

Petitioner,

v.

THOMAS E. FERRANDINA, UNITED STATES MARSHALL, SOUTHERN DISTRICT OF NEW YORK,

Respondent.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the petitioner, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
IRVING R. KAUFMAN, Chief Judge

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States

Appendix L, Order Denying Rehearing.

Court House, in the City of New York, on the 21st day of May one thousand nine hundred and seventy-six.

Elijah Ephraim Jhirad,

Petitioner,

v.

Thomas E. Ferrandina, United States Marshal, Southern District of New York,

Respondent.

Elijah Ephraim Jhirad having petitioned for rehearing by notice of motion dated April 23, 1976, it is hereby ordered that the petition is denied.

In an opinion rendered on April 12, 1976, we affirmed an order of the Southern District denying Jhirad's request for habeas corpus relief from a writ of extradition requiring his return to India for trial upon charges of embezzlement. *Jhirad* v. *Ferrandina,* Dkt. No. 75-2102 (2d Cir.), slip op. 3189 (Jhirad II). Jhirad now petitions for reconsideration of that decision upon various grounds, only one of which merits discussion.

Jhirad contends, for the first time, that the magistrate's decision which formed the predicate to both our own ruling and that of Judge Duffy is void for lack of jurisdiction. Specifically, Jhirad argues that Magistrate Goettel, proceeding on remand from an earlier habeas petition, was without authority to conduct, as he did, an evidentiary hearing. Jhirad cites *Wingo* v. *Wedding,* 418 U.S. 461, 472 (1974) for the proposition that "§ 2243 requires that the District Judge personally hold evidentiary hearings in federal habeas cases . . ."

Appendix L, Order Denying Rehearing.

Jhirad would thus impose a bifurcated structure on international extradition proceedings, conceding the authority of the magistrate under 18 U.S.C. § 3184 to conduct an evidentiary hearing prior to issuing the writ of extradition but denuding him of that power once the writ has been issued and review sought through the only available avenue of relief—a petition for habeas corpus. Such an approach is supported neither by logic nor law. The impracticality of totally prohibiting the continued participation of the one judicial officer who, as here, is often most familiar with the underlying facts of the case is readily apparent. *Wingo* v. *Wedding, supra,* upon which Jhirad relies as compelling this anomalous result, arose in the wholly different context of a domestic criminal prosecution and revolved around an interpretation of an entirely different statute, the Federal Magistrates Act, 28 U.S.C. § 636(b).

In any event, Jhirad is foreclosed from asserting this claim by his failure to raise it at an earlier stage in the proceedings. Even if Judge Duffy erred in not himself conducting an evidentiary hearing upon our remand in *Jhirad* v. *Ferrandina,* 486 F.2d 442 (2d Cir. 1973) (Jhirad I), that error was one of law only and did not, as Jhirad suggests, deprive the district court of jurisdiction to entertain the petition for habeas corpus nor void its order upon which our opinion in Jhirad II was based. Non-jurisdictional objections must, of course, be timely raised or they are waived. See *Wilkerson* v. *Meskill,* 501 F.2d 297 (2d Cir. 1974).

J. Edward Lumbard
J. EDWARD LUMBARD
Wm. H. Timbers (WFH)
WILLIAM H. TIMBERS
Circuit Judges
Frederick vP. Bryan
FREDERICK vP. BRYAN
District Judge

Appendix M, Order Granting a Further Stay.

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 26th day of May, one thousand nine hundred and seventy-six.

Elijah Ephraim Jhirad,
Petitioner,

v.

Thomas E. Ferrandina, United States Marshal,
Southern District of New York,
Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated May 24, 1976 for a further stay of mandate pending application to the Supreme Court of the United States for a writ of certiorari be and it hereby is granted to and including June 24, 1976.

J. Edward Lumbard
J. EDWARD LUMBARD
Circuit Judge

.....
FREDERICK vP. BRYAN
District Judge

Supreme Court, U. S.
FILED
JUL 24 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-1860

ELIJAH EPHRAIM JHIRAD,

Petitioner,

vs.

THOMAS E. FERRANDINA, United States Marshal Southern District of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1975

No.

ELIJAH EPHRAIM JHIRAD,

Petitioner,

vs.

THOMAS E. FERRANDINA, United States Marshal Southern District of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner, while serving as Judge Advocate General of the Indian Navy, was charged by the Government of India with the responsibility of disbursing a certain Naval Prize Fund. The Government, not being able to audit the fund due to the destruction of the records at petitioner's behest in 1962, instituted an investigation. During the pendency of the investigation of which he was aware, petitioner prepared to leave India by disposing of his law books and other personal possessions. He also arranged for his law practice to be handled

by a junior associate. In conjunction with the investigation the Central Bureau of Investigation (CBI) had served a notice on the Central Bank of India to turn over copies of accounts relating to the Naval Prize Fund. Thereafter petitioner contacted a Mr. K. B. Mathur at the bank to discuss matters concerning his personal account. At this time petitioner was advised by Mr. Mathur that the bank had been requested by the CBI to turn over their records. Petitioner subsequently left India, never to return. Such behavior is incompatible with the image he has sought to present in the proceedings below, *i.e.*, an eminent attorney being subjected to harassment for his political beliefs. Petitioner at the time of his departure from India was still officially a member of the Naval Service, having been on half-pay leave of absence from December 1, 1964 to November 30, 1965. After the expiration of leave, he never returned to his official duties.

The fund charged to petitioner's trust amounted to $400,000, a not insignificant sum and for which no accounting or audit was made. The Government's interest in bringing petitioner to justice should not be minimized solely because the court below has held that individual acts of embezzlement which comprised petitioner's unlawful course of conduct with respect to the fund were in large part time-barred. The record established the implementation of petitioner's scheme for the period February 14, 1959 to December 5, 1961, culminating in the destruction of the records and subsequent flight abroad. This kind of corruption involving highly placed government officials is a particular outrage and it is the duty of any government to pursue this socially debilitating type of crime. Petitioner's position of authority and trust serves only to heighten the severity of the allegations and should not be used by him as a shield. Notwithstanding the amount involved, the Government had no choice but to bring to account officials who have abused their public trust.

REASONS FOR DENYING THE WRIT

I.

The magistrate had jurisdiction to conduct the initial evidentiary hearing and the remanded hearing required by 18 U.S.C. §3184.

The magistrate is empowered by the extradition statute, 18 U.S.C. §3184 to hear all evidence pertaining to an extradition proceeding. Elementary rules of statutory construction require that a specific statutory mandate take precedence over a general rule. 28 U.S.C. §2243 applies generally to habeas corpus proceedings, the majority of which arise from federal or state criminal prosecutions. The law of international extradition, however, is a specialized area engrafted through statutes and treaties upon the general body of criminal law. Such proceedings are essentially an expression of comity between sovereign nations and are thus only remotely connected to the internal law of the country responding to the extradition request. *Factor v. Laubenheimer,* 290 U.S. 276 (1933) at p. 298.

Petitioner's effort to inject into the proceedings the entire body of American jurisprudence concerning habeas corpus ignores the unique nature of an international extradition. As the Court of Appeals noted, this imposition of a bifurcated structure upon extradition proceedings, one for the initial hearing and a second procedure for appellate review, is "supported neither by logic nor law." (Appendix, 104a).

A further consideration is that the judiciary's role in international extradition has been narrowly defined both by treaty and statute. It would therefore be improper to alter the nature of these proceedings by imposing a complex bifurcated structure, in the face of the legitimate exercise of the executive treaty power and its concurrent support by Congress through legislation. *Terlinden v. Ames,* 184 U.S. 270 (1901) at p. 290.

II.

Petitioner was given ample notice of the issues involved in determining whether he possessed the requisite intent to flee.

Petitioner in Points I, III and IV of his petition for a writ of certiorari has misrepresented and confused several issues. While there is a conflict among the circuits as to the requirement of intent in order to toll the running of the statute of limitations, this issue was decided squarely in petitioner's favor by the Second Circuit when in *Jhirad I* it held that absence alone was not sufficient to prevent the statute from running. Petitioner cannot now claim that the Second Circuit by accepting the magistrate's explicit findings of the requisite intent reversed itself.

Secondly, the magistrate's finding as to petitioner's intent was a finding of fact which the Second Circuit in *Jhirad II* determined was amply supported in the record. The magistrate, perhaps ill-advisedly, used the legalistic phrase "constructive flight" to describe the facts of the case. The magistrate did, however, find a generalized intent to flee which was formalized after the petitioner left India. The evidence which enabled the magistrate to determine petitioner's intent was necessarily of a continuing nature; extending backward in time to the initiation of the investigation and forward to his movements after leaving India. In every case where flight is an issue the defendant has ample notice that his movements before and after leaving a jurisdiction will form the basis of the fact-finder's opinion. The words "constructive flight" are not the beginnings of a new legal doctrine but a shorthand method of description used by the finder of fact in this case.

The rights of the petitioner have been assiduously protected by the courts and he has had every opportunity to properly prepare for his defense to these proceedings.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to review the opinion and judgment of the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

LOUIS STEINBERG
Attorney for
the Government of India

EDWIN A. STEINBERG
Of Counsel

Supreme Court, U. S.
FILED
SEP 3 1976
MICHAEL RODAK, JR., CLERK

No. 75-1860

In the Supreme Court of the United States

OCTOBER TERM, 1976

ELIJAH EPHRAIM JHIRAD, PETITIONER

v.

THOMAS E. FERRANDINA, UNITED STATES MARSHAL, SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1860

ELIJAH EPHRAIM JHIRAD, PETITIONER

v.

THOMAS E. FERRANDINA, UNITED STATES MARSHAL, SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The Government of India, the real party in interest to this case, seeks the extradition of petitioner pursuant to 18 U.S.C. 3182 and 3184. India contends that petitioner, while Judge Advocate General of the Indian Navy, embezzled money from a prize fund set up to compensate naval veterans.

In 1966, petitioner left India to attend the World Jewish Conference in Belgium. Petitioner elected not to return to India and, instead, lived in Switzerland and Israel before coming to the United States in June 1971. Thereafter, the Government of India asked that petitioner be extradited in connection with the embezzlement charges. After a hearing before a magistrate petitioner was found extraditable (Pet. App. D), and the United States District Court for the Southern District of

New York denied petitioner's habeas corpus petition (Pet. App. E). The court of appeals reversed, however, and remanded the case for a determination whether petitioner fled from India with intent to avoid prosecution (Pet. App. F). Upon remand, the case was referred to the magistrate, who found that petitioner's decision not to return to India was prompted by an intent to avoid prosecution and, hence, that petitioner was subject to extradition (Pet. App. H). The district court denied petitioner's subsequent petition for a writ of habeas corpus (Pet. App. I), and the court of appeals affirmed (Pet. App. J). Extradition was stayed pending the instant petition for a writ of certiorari (Pet. App. M).

The Extradition Treaty of December 22, 1931, 47 Stat. 2122, (Pet. App. A), under which the Government of India has sought petitioner's extradition, does not provide that the United States shall represent the extraditing country. The Government of India, therefore, has been represented throughout this litigation by privately-retained counsel. The United States did participate in the proceedings below, but solely to defend the applicability of the 1931 Treaty. That question is not raised in the petition for certiorari.

Since the interested parties have been and are represented by private counsel, and since the United States has not addressed the issues raised by the petition for certiorari, the United States neither supports nor opposes the petition for certiorari.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

DOJ-1976-09